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APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

ADURMONI DEYI (DEFENDANT) *v.* CHOWDHRY SIB NARAIN KUR (PLAINTIFF).*

1877 Sept. 5.

Hindu Law—Mitakshara—Son's Interest in Ancestral Estate—Burden of Proof.

In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother: and that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority.

Held that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest.

Held also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1), not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which

* Special Appeal, No. 832 of 1876, against a judgment of W. Macpherson, Esq., Officiating Judge of Cuttack, upholding a decision of Baboo Chunder Prosonno Dutt, Moonsif of Balasore.

(1) 14 B. L. R., 187.

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the alienation was made, was incurred for an immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was.

Quære.—Is a son bound to discharge debts of the father which are illegal, though not immoral?

THIS was a suit for the recovery of Mouza Similia and half of Mouza Gentia, on the allegation that the plaintiff's father, during the minority of the plaintiff, improperly sold the said properties without the consent of the plaintiff, the family being governed by Mitakshara law. There was a further allegation that no necessity or occasion had existed for the sale. The sale of the second mouza took place on the 16th of May, 1862, to the defendant, for a consideration of Rs. 1,750, and the defendant thereupon entered into possession. The property in dispute originally formed part of the estate of one Chowdhry Huri Narain Kur Mahapetar, the grandfather of the present plaintiff, who, during his lifetime, divided his ancestral and self-acquired property between himself and his brother, under a registered deed of partition dated the 5th Assar, 1237 (27th September, 1830). On the death of the grandfather, his two sons, the father and uncle of the present plaintiff, by a deed of partition dated the 7th Cheyt, 1242 (18th of March, 1836), divided the estate of their father between them, the father of the plaintiff receiving the property in dispute as part of his share. The present suit was instituted on the 4th of May, 1874. The lower Appellate Court held that the share of the property obtained by the father of the plaintiff was ancestral property. The Court also held that the burden lay on the defendant to show that the sale to him by the father of the plaintiff was founded on legal necessity, and gave the plaintiff a decree. The defendant preferred a special appeal to the High Court.

Baboo *Komolakant Sen* for the appellant.—The incidents attached to ancestral property under Mitakshara law were destroyed by the partition made by the grandfather of the respondent. The property, the subject of the suit, belonged absolutely to the father of the plaintiff. Under Mithila law, ancestral property which descends to a father is not exempted from liability for his debts because a son is born; see *Girdharee*

Lall v. *Kantoo Lall* (1.) The burden of proof that the sale made by the father of the plaintiff was not legally necessary should have been on the plaintiff.

Mr. *Twidale* for the respondent.—The property of the father of the respondent was ancestral property—*Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (2). The onus was properly cast on the defendant. Alienations by a member of a joint Hindu family cannot be made except for the benefit of the family—*Sadabart Prasad Sahu* v. *Foolbash Koer* (3). It lies, therefore, on the alienee to show the circumstances under which the alienation was made.

The following judgment was delivered by

MARKBY, J. (PRINSEP, J., concurring).—The plaintiff in this case sued to recover possession of a mouza which he alleged to be his ancestral property. He stated that the property had been sold to the defendant by his father in May, 1862, that is twelve years, all but a very few days before this suit was brought; but that, as there was no necessity for the sale, it was void, and not binding on him, the plaintiff.

The plaintiff claimed to belong to a family governed by the Mitakshara law. There was some dispute about this, but this point has been finally settled in favour of the plaintiff.

It has also been argued that this property is not to be considered as ancestral, because, though it belonged to the grandfather of the plaintiff, the father of the plaintiff made a partition of the family property with his own brother, and the mouza in suit, when it fell to the share of the plaintiff's father, belonged to him absolutely as his separate property, and his son did not on his birth acquire any interest therein. Upon this point we think the decision of the Courts below that the son acquired an interest in this property at his birth is correct. There is no authority for the contrary.

The remaining question for consideration in the suit now before us is, whether the sale was, under the circumstances,

(1) 14 B. L. R., 187. (2) 6 W. R., 71. (3) 3 B. L. R., F. B., 31.

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binding upon the plaintiff. Both the lower Courts have held that it is not, but it is argued in special appeal that, in deciding this question, the Courts below have not adopted the correct principles of Hindu law. The Munsiff says,—"The Mitakshara law rules that a son, as soon as he is born, has equal right with his father in his ancestral property, consequently, a father cannot, without the consent of his son, and in the absence of any legal necessity, sell his ancestral property. This being so, the burden of proving that the sale sought to be set aside was made under a legal necessity, as adverted to, is wholly on the defendant." Subsequently he says—"As, therefore, the defendant has failed to prove the existence of a legal necessity which alone could render her purchase valid, plaintiff is not bound by the sale under consideration." And the District Judge says—"It is for the defendant to show that the sale was effected for at least reasonable, if not pressing, necessity. He has failed, however, to produce any proof which can be regarded as in the slightest degree satisfactory. There is no proof of the existence of any debts or pressure of any kind such as would justify the sale; on the other hand, there is certainly far better evidence to show that there was no real necessity, but that the sale took place simply to provide means for the gratification of loose and extravagant tastes."

Whatever may have been once thought in this Court I do not think that, after the decision of the Privy Council in *Girdharee Lall* v. *Kanto Lall* (1), it can be said that this is the right way of dealing with such a case.

There was certainly at one time a disposition in this Court to treat the father as having no power whatever to bind his son by his disposition of the ancestral property of the family except in cases where the son was a minor, and there was legal necessity to dispose of the property; putting, therefore, the father, as regards his minor son's interests in the property, in the same position as a guardian. The effect of this view of the position of the father under the Mitakshara law, coupled with the deci-

(1) 14 B. L. R., 187.

sion of the Full Bench in the case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), that no member of a Mitakshara family can dispose even of his own share, was practically to enable the son to set aside *in toto* all alienations of the family property made during his minority, unless the alienee could show that the alienation was one which was really necessary for the preservation of the interests of the family.

But the Privy Council in the case *Girdharee Lall* v. *Kantoo Lall* (2) have taken an entirely different view of the position of the son under the Mitakshara law. Proceeding upon a decision of the Sudder Dewany Adawlut, they have practically put the son in the same position with respect to debts contracted by his father, as if he had succeeded to the ancestral estate as heir upon the death of his father. They say—" It would be a pious duty to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts." And they infer from this that an alienation made to satisfy such debt of the father is binding on the son.

Applying these principles to the present case, it appears to me that the true question for consideration is, not whether there was any legal necessity for the sale of this property, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid by him, the son would, under the Hindu law, be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then I think, according to the Privy Council decision, the sale is valid.. And I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that, under the Hindu law, he is not liable. That seems to be the view taken in the passage printed at page 197 of the report.

I do not mean it to be inferred from what I have said above that a son is bound to discharge debts that are illegal although not immoral: that is an altogether different question, and not now under consideration.

(1) 3 B. L. R., F. B., 31. (2) 14 B. L. R., 187.

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I think, therefore, that the question which the Court below should have proposed for consideration was, whether the debt which this property was sold to satisfy was incurred for an immoral purpose.

Upon the question of onus I have had more doubt. One would be inclined to think that the party alleging immorality was bound to prove it. Probably, however, the question of onus is one which must be determined according to the circumstances of each particular case. But I have no doubt whatever that, under the circumstances of this case, the onus ought to be placed upon the plaintiff. The transaction took place a very long time ago, and the plaintiff attained his majority seven or eight years before he took any steps to set this purchase aside. I think it would be a grievous injustice to allow him now to do this, unless he can show affirmatively that the transaction is one which the law renders void.

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Mitter.

1877 *March* 12.

WATSON & CO. (DEFENDANTS) *v.* DHONENDRA CHUNDER MOOKERJEE (PLAINTIFF).*

Res judicata—Limitation—Beng. Act VIII of 1869, *s.* 29—*Tenancy in abeyance—Obligation to payment.*

A, the zemindar, granted a patni lease of certain talooks to *B*, who assigned it to *C* and *D*. On *B's* death, *C* and *D* applied to the Collector for registration of the patni talook in their names as assignees of *B*. *A* objected to the registration on the ground that the lease enured only for the life of *B*. *A's* objection being overruled, he instituted a regular suit to eject *C* and *D*, the present defendants, which was decided against *A* finally by the Privy Council in 1874. During the pendency of this litigation, the zemindar sued to recover the rent for the year 1868, not upon the basis of the patni lease, but for use and occupation, treating the tenants as mere trespassers. This suit was dismissed on the ground that the plaintiff ought to have sued on the lease. In 1875, the plaintiff brought the present suit for the rent of 1868 on the patni lease. The defendants pleaded *res judicata* and limitation. The plaintiff contended that the suit was within time on the ground that the right to

* Regular Appeal, No. 270 of 1875, against a decree of Baboo Jadu Nath Mullick, Subordinate Judge of Zilla Midnapore, dated the 4th of September, 1875.

recover the rent was in suspense during the pendency of the litigation regarding the lease. *Held*, that the suit, though not *res judicata*, was barred under s. 29 of Beng. Act VIII of 1869.

Rani Swarnamayi v. Shashi Mukhi Barmani (1) distinguished.

SUIT to recover arrears of rent due in respect of certain estates in the Zilla of Midnapore held by the defendants as patnidars.

Two different patni leases, respecting the property of which rent was now claimed, were obtained originally by John Watson and Robert Watson. The defendants were their successors as transferees of their rights and interests in the above leases. The two Watsons dying in 1865, the defendants preferred an application before the Collector for the special registration of the patnidars as transferees of the original lessees. The plaintiff objected to the registration, but the objection was overruled. The plaintiff, thereupon, instituted two separate suits in 1868, against the defendants, on the ground that the leases enured for the joint lives of the grantees, and that rights thereunder were inalienable. These suits were dismissed finally by the Privy Council on the 21st of February, 1874. During the pendency of this litigation, the zemindars sued to recover from the patnidars rent for the year 1275, F. S. (1868), for use and occupation of the property, in order to avoid any admission that the leases were still in existence. The defendants pleaded in that suit that the plaintiff ought to have sued on the basis of the patni pattas, and not for use and occupation. The plaintiff's suit was dismissed upon this objection of the defendants on the 29th of June, 1872. The validity of the leases being finally established, the plaintiff now sued upon them to recover the rent for the year 1868.

The defendants pleaded, *inter alia* — (1) accord and satisfaction; (2) that the suit was a *res judicata;* and (3) that the claim was barred under s. 29 of Beng. Act VIII of 1869.

The Subordinate Judge of Midnapore framed, among others, the following issues:—

1. Whether the claim was liable to dismissal under s. 2 of Act VIII of 1859?

(1) 2 B. L. R., P. C., 10; S. C., 12 Moore's I. A., 244.

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2. Whether limitation barred the claim for rent for the year 1868?

The Subordinate Judge held, with reference to these two issues, that the plaintiff's claim was not "heard and determined" in the previous suit within the meaning of s. 2 of Act VIII of 1859; and that, according to the principles laid down by the Privy Council in *Rani Swarnamayi* v. *Shashi Mukhi Barmani* (1), and the decisions of the High Court in *Eshan Chunder Roy* v. *Khajah Assanoollah* (2) and *Dindayal Paramanik* v. *Radha Kishori Debi* (3), the plaintiff's right to recover the rent for 1868 was not barred under s. 29 of Beng. Act VIII of 1869.

The defendants appealed to the High Court.

Mr. *Evans* (Baboo *Bhawany Churn Dutt* with him) for the appellants.

Mr. *Woodroffe* (Baboo *Mohini Mohun Roy* with him) for the respondent.

Mr. *Evans*.—The plaintiff's suit is barred under s. 29 of Beng. Act VIII of 1869. The rent fell due in 1871, and the present proceeding was not instituted until the 19th of February, 1875. The cases referred to by the lower Court do not apply; on the contrary, *Huronath Roy Chowdry* v. *Golucknath Chowdry* (4) and *Buroda Kant Roy* v. *Chunder Coomar Roy* (5) are exactly in point. In *Rani Swarnamayi's* case (1), as pointed out by Jackson, J., the landlord could not have brought the suit for the old rents until the tenant was replaced in the possession of the talook. In the present case, as in *Buroda Kant Roy* v. *Chunder Coomar Roy* (5), the tenants were in possession of the land; there was nothing to prevent the plaintiff from suing in the alternative as well on the basis of the special contract alleged by the defendants as for use and occupation. The plaintiff's suit is also barred under s. 2. of

(1) 2 B. L. R., P. C., 10; S. C., 12 Moore's I. A., 244.
(2) 16 W. R., 79.
(3) 8 B. L. R., 536.
(4) 19 W. R., 18.
(5) 23 W. R., 280.

Act VIII of 1859. He had sued previously for use and occupation, but the cause of action on which he now sues had then arisen, and the mere fact of the plaintiff suing upon a different title would not save it from being barred: *Denobundhoo Chowdry* v. *Kristomonee Dossee* (1).

Mr. *Woodroffe* for the respondent.—The principal of equity upon which the case of *Eshan Chunder Roy* v. *Khajah Assanoollah* (2) was decided is exactly applicable to the present case. It was held in that case, that certain steps which were necessary under Reg. XI of 1822 to put an end to the tenure had not been taken, and that the zemindar's suit for ejectment having fallen through on that account, the suit to recover the rents for the period during which the action for ejectment was pending would not be barred by the special limitation provided by the Statute. What is submitted in the present case is this, that as long as the relationship of landlord and tenant is *pendente lite* the right to sue remains in abeyance, and only comes into force when the right is re-established. Couch, C. J., in *Dindayal Paramanik* v. *Raha Kishori Debi* (3), distinctly laid down the character of the obligation on the part of the tenant to pay rent, and the time when it came into operation after remaining in suspense for the period during which the relationship between the parties formed the subject of litagation. It is submitted, therefore, that the right of the plaintiff to recover the rent of 1868 is not barred under s. 29 of Beng. Act VIII of 1869. [The learned counsel was stopped in his argument on the question of *res judicata*, the Court intimating that they were clearly of opinion that the plaintiff's suit was not barred under s. 2 of Act VIII of 1859, as the cause of action upon which he now sued, was not "heard and determined" in the previous suit.]

Mr. *Evans* in reply.—There is no doubt that Beng. Act VIII of 1869 contains two sections respecting the time when rent became due. But from the arguments before Couch, C. J., it would appear that it was assumed as undisputed that rent falls due at the end of the year. The law provides that the tenancy

(1) I. L. R., 2 Calc., 152. (2) 16 W. R. 79. (3) 8 B. L. R., 536.

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would be determined only by a particular process, and that a period of grace should be allowed to the tenant during which he may elect to continue his tenancy as before. The result of his exercising this option would carry with it the arrears of rent. That is all the effect of the Chief Justice's decision. It does not go further. Under s. 32, there can be no doubt that the rents fall due at the end of each year. In *Rani Swarnamayi's* case (1) there was a moment of time when the tenancy was in abeyance, during which the tenant had not exercised his right of option whether he would have himself be treated as trespasser or tenant. In this case, there was no such abeyance at any time. The contention that the tenancy, together with the obligation to pay rent, was in abeyance whilst the litigation was going on, is absurd; for the tenants never denied the relationship or contested the liability; the cause of action was existing, but the plaintiff, instead of suing upon it, elected to treat the defendants as trespassers. It is submitted, therefore, that if it is not a *res judicata*, the right to sue for the rent of 1868 is barred by the limitation provided by Beng. Act VIII of 1869.

cur. adv. vult.

The judgment of the Court was deliverd by

MARKBY, J.—This was a suit brought by the plaintiff on behalf of the zemindars to recover arrears of rent due in respect of certain estates in the Zilla of Midnapore, held by the defendant as patnidars. The rents claimed were those which fell due between Bysack, 1275, and Aughran, 1281. The defence set up was, first, that as to the rent which fell due in 1275, the suit was barred by s. 2 of Act VIII of 1859; secondly, that as to all the rent which fell due prior to the 30th of Cheyt, 1277, the claim was barred by limitation; thirdly, that the defendants had paid to one Captain Murray Rs. 2,500 out of the rent due by the order of the plaintiff. The defendants contended that if these deductions were made, only Rs. 2,780-3 remained due for rent, which amount they had deposited in the Collectorate.

(1) 2 B. L R., P. C., 10; S. C., 12 Moore's I. A, 244.

It appears that the zemindars of this property and their patnidars have been for a long time in litigation with each other. In the year 1271 some opposition was made by the zemindars to the patnidars getting their names registered by the Collector. This opposition was unsuccessful, and the zemindars thereupon brought two suits to recover possession of the estates, alleging that the patni leases had determined. These suits were dismissed in the year 1275. The zemindars appealed to the High Court, and their appeal was dismissed in the year 1276. The zemindars further appealed to the Privy Council, and in the year 1280 their appeal being again dismissed, this litigation terminated. Pending this litigation the zemindars had brought a suit to recover from the patnidars the amount which would have been due in respect of the patni rent for the year 1275 but the suit was dismissed, because the zemindars sought to recover that amount, not as rent, but for the use and occupation by the patnidars of the property; the object of bringing the suit in this form being to avoid any admission that the patni leases were in existence.

It is scarcely necessary to do more than to state these facts to show that the first ground of defence cannot be maintained. The defendants, or those whom they now represent, got the suit for the rent of 1275 dismissed upon the ground that it had not been brought upon the patni leases. The present cause of action, which is based upon the patni leases, was in no sense "heard and determined" in that suit. The first ground of defence, therefore, fails.

It will be convenient next to take the third ground of defence. The Subordinate Judge has found that the defendants have not proved the payment, and I see no reason to interfere with his decision upon this point. Supposing it to be proved that the two receipts produced by the defendants were duly given as alleged by the executor of Captain Murray, still it is not shown that those payments were made on account of the rent of these estates. There is upon the record a document which shows that the defendants were authorized to make certain payments to Captain Murray, and to deduct those payments from the rents due by them to the zemindars; but it is sworn by the plaintiff

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that one of the defendants distinctly stated to him that no such payment had been made, and had these payments been made as the defendants now allege, there can scarcely be any doubt that one or both of them would have been pleaded in part satisfaction of the claim for rent which fell due between Bhadro and Choitro of the year 1274, and which the plaintiff appears to have recovered in full by a decree of Court. The defendants asked to be allowed to give further evidence upon this point, but in this case both parties seem disposed to stand upon their strict rights, and I see no reason to grant them this indulgence.

It remains to consider the question of limitation. S. 29 of Beng. Act VIII of 1869 provides that suits for the recovery of arrears of rent shall be instituted within three years from the last day of the year in which the arrears claimed shall have become due; and I think I may get rid of some of the confusion which has crept into the discussion of this part of the case by saying at once that there is nothing, unless it be some provision in the Statute itself, which will justify us in extending this period of limitation. What we have to see is when did these arrears of rent become due, and have three years elapsed since that time? *Primâ facie* the rents became due upon the dates when they were payable under the patni leases. But the plaintiff contends that, in this case, the rents did not fall due upon those dates, because the right to demand the patni rents was what he calls "in suspense during the pendency of the litigation as to the existence of the patni leases, and that the cause of action as to the rents which accrued during this litigation did not arise until the zemindar's suit to recover possession had been dismissed by the highest Court of appeal." This is how the case is put in the plaint, and this is how it has been put before us in argument upon the appeal.

The real question seems to me to be whether the defendants continued to be the patni lessees of the zemindars after the existence of their patni leases had been denied, and the suits to recover possession had been commenced; or, to put it more generally, does a landlord, by merely denying the tenancy and bringing a suit to recover possession, in which he is ultimately unsue-

cessful, put an end to the tenancy so long as the litigation is going on; and is the tenant at the end of the litigation restored to his tenancy from which he has been for the time ousted, or does he simply retain a possession which has never been disturbed. It seems to me scarcely possible to doubt which of these two views is correct. I cannot see how the mere denial of the landlord, or a denial coupled with an unsuccessful attempt to eject the tenants, can in any way affect the tenant's position.

The plaintiff has, however, relied on some decisions which he says support his contention.

The first case is that of *Rani Swarnamayi* v. *Shashi Mukhi Barmani* (1). There the patnidars being in arrears the zemindar had sold the patni for arrears of rent. The patnidars were ousted, and the purchaser put into possession. Subsequently, this sale was set aside on the ground of irregularity, and the patnidars were restored to possession. A suit was then brought by the zemindar against the patnidars for arrears of rent in respect of the period that the patnidars were out of possession; the patnidars pleaded limitation, but the Privy Council held that, upon the setting aside of the sale, and the restoration of the parties to possession, they took back the estate subject to the obligation to pay the rent, and that the particular arrears of rent there sued for must be taken to have accrued due in that year in which the restoration took place; and the Privy Council are further careful to overrule an opinion which had been expressed by two learned Judges of this Court that the sale by the zemindar had, by reason of the irregularity, become altogether inoperative. The other case is that of *Dindoyal Paramanik* v. *Radha Kishori Debi* (2); that case proceeds entirely upon the authority of the Privy Council decision above stated, and lays down no principle. There the zemindar had, under the lease, a right to put an end to the tenancy if the rent fell into arrear. The zemindar had exercised this right, and brought his suit to recover possession. He ultimately obtained a final decree for possession, but the tenant then took the advan-

(1) 2 B. L. R., P. C., 10; S. C., 12 Moore's I. A., 144.
(2) 8 B. L. R., 536.

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tage which the law of this country gives him of staying the ejectment by payment of the rent within fifteen days. A Division Bench of this Court held, that the obligation to pay the arrears of rent there sued for arose when the tenant took advantage of this provision of the law in his favor.

The only other case relied on by the plaintiff is that of *Eshan Chunder Roy* v. *Khajah Assanoollah* (1). The facts are not given in the report, and all we know is, that the learned Judges who decided it thought that the principle laid down by the Privy Council very clearly applied to that case also.

So far, therefore, as authority is concerned, what we have principally to deal with is the decision in the Privy Council. But I think that that case is clearly distinguishable from the present. In that case, by a proceeding which, though irregular, was not inoperative, the zemindar had put an end to the tenancy and ejected the tenant. The tenant taking advantage of the irregularity got this proceeding set aside, and recovered possession. The Privy Council held that the tenant recovered the tenancy burdened with the obligation to pay the arrears of rent. In the present case there was no proceeding, however irregular, by which the zemindar could put an end to the tenancy. In no sense of the word was the tenant ousted, nor when the litigation terminated, was he restored to possession. The landlord had, no doubt, put himself into a position in which he considered it disadvantageous to himself to accept or recover rent from his tenant; but the tenant's position remained, as far as I can see, wholly undisturbed. It seems to me, therefore, that there is no ground upon which we can depart from the ordinary rule that the rents fell due in each successive year according to the dates specified in the patni pattas.

The plaintiff has, however, attempted to escape the effect of the law of limitation by alleging that an entirely new and different cause of action arose by reason of a settlement of accounts which he alleges took place between himself and the defendants in Cheyt, 1281 (March, 1874). He says that zemindar's accounts were then submitted of the rents due from the

(1) 16 W. R. 79.

1st of Bysack, 1275, to Aughran, 1281, and it wes agreed that if certain deductions were made on account of payments to Captain Murray, the balance would be settled and paid. The plaintiff says, that he agreed to the proposed deductions, but that the defendants subsequently refused to pay the amount agreed upon. The plaintiff has not been very clear as to what use he would make of this arrangement. In the Court below he seems rather to have relied upon it as an acknowledgment which would bar the operation of the Statute of limitation, though I think he did also put it forward, though less confidently, as what under the English law is called an "account stated." I do not understand that the plaintiff any longer insists upon this arrangement as affecting the operation of the law of limitation upon the claim for arrears of rent. He did not produce at the trial any acknowledgment which would have that effect. Nor does the evidence seem to me to prove an account stated which would form an independent cause of action. He says that the account showed Rs. 24,143-10 as the whole amount due, and that from this Rs. 2,500 was deducted on account of Captain Murray, and four or five hundred rupees besides, but he cannot say exactly how much. But the very essence of an account stated is that an exact account was agreed upon between the parties. But there is a further difficulty in the way of the plaintiff in this part of the case. He says in his evidence "I did not agree to allow unconditionally the deduction of Rs. 2,500; this is also stated in the plaint." The plaint is certainly susceptible of this interpretation. It may mean that the arrangement was that if the rents were paid minus the deduction without further dispute, then, and then only, the deduction would be allowed. But this is not such a final statement of accounts as would give the plaintiff a new cause of action.

I think, therefore, that so much of the claim as is for arrears of rent which fell due prior to the 30th Cheyt 1277 is barred by the law of limitation. As to the question of interest both parties are dissatisfied with the decision of the Subordinate Judge upon this point. He has allowed interest from the time the validity of the patni leases was finally established, and he

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thinks that, up to that time, it was, no doubt, the fault of the zemindars that the rents were not paid. This is not altogether so. If the defendants felt any hesitation about paying as for use and occupation, they might have deposited the rents in the *Collectorate*. S. 21 of *Beng*. Act VIII of 1869 shows that, ordinarily, a landlord will get interest unless there are special grounds for making an exception. We do not think that such special grounds exist here. The account will be made up upon this principle, and deducting the amount deposited with the Collector, which the plaintiff is entitled to receive, the plaintiff will get a decree for the balance, and costs of both Courts in proportion. Costs to be added to the amount decreed, and the whole to carry interest at 6 per cent. from the date of decree.

Two objections only have been pressed before us in this case. One is, that interest should not be allowed on the sum of Rs. 2,780-3-8 tendered in December, 1874. According to the usual rule, the plaintiff was only bound to accept the amount he was then entitled to receive. He was not bound to accept a less sum; and, therefore, the tender of it ought not to stop interest running upon it.

On the other question,—namely, whether interest should be given from the date of the decree, it is only objected that that question was not open to us on the appeal. It is sufficiently raised by the objections taken on both sides to the amount of interest allowed by the Court below. Both the objections, therefore, fail. The decree will be made up upon the account filed by the plaintiff.

The plaintiff will be entitled to the costs of this hearing.

Decree varied.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

KINMOND *vs.* JACKSON AND ANOTHER.

1877
Aug. 27.

Limitation Act IX of 1871, *sched. ii, arts.* 11, 118—*Exclusive Privilege—Account of Profits—Damages—Act XV of* 1859, *s.* 22.

In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground, *viz.*, the period prescribed by art. 11, sched. ii, Act IX of 1871.

The facts and arguments sufficiently appear in the judgment of the Court.

Mr. *J. D. Bell* and Mr. *Branson* for the plaintiff.

The *Advocate-General*, offg. (Mr. *Paul*). Mr. *Jackson*, and Mr. *Agnew* for the defendants.

GARTH, C. J. (MACPHERSON, J., concurring).—This was a suit for an injunction to restrain the defendants from infringing an invention of the plaintiff for the rolling of tea leaf, the specification of which was filed, under the provisions of Act XV of 1859, on the 6th November, 1865; and the plaintiff also prayed for an account of the profits made by the defendants, and for damages.

The question of infringement has virtually been decided by our judgment in the several rules obtained by the plaintiff on the one hand, and the defendant, W. Jackson, on the other, which was given on the 19th of August last. In the first of those rules we decided, that Jackson's invention, the specification of which was filed on the 25th of April, 1873, was substantially an imitation of Kinmond's; and it is admitted, that between that date and the commencement of this suit, the defendants have been making, using, and selling a number of machines in accordance with that specification. The parties have very properly consented, that all the affidavits and mate-

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rials which were used before the Court on the argument of the rules, should be taken as evidence in this suit. The infringement, therefore, being established, it is clear that the plaintiff is entitled to the injunction for which he prays.

As regards the rest of his claim, the defendant objected at the trial, that the plaintiff was not entitled both to damages and to an account; and that he must elect between the two remedies. This is quite true, and the plaintiff has, accordingly, elected to have an account of the profits; but then comes the only real question in the case, for how many years before suit, the account is to be taken.

The defendant contends, that article 11 in the second schedule to the Limitation Act is the one applicable to this suit. That article enacts, that in a suit for damages for infringing a copyright or any other exclusive privilege, the period of limitation shall be one year from the date of the infringement.

On the other hand, the plaintiff contends, that as he has waived his claim for damages, and asks to have an account instead, the suit is one which would have been brought in a Court of equity in England for an injunction and an account; and, therefore, that article 118 of schedule ii applies to this case, as being a suit for which no period of limitation is provided elsewhere in the schedule.

I was of opinion at first, that the plaintiff's contention was right; but upon consideration, and more particularly having regard to the repealed section of the Indian Copyright Act XX of 1847, and to the Patent Act of 1859, I have come to a different conclusion.

By the 16th section of the Indian Copyright Act it was provided, that "all actions, suits, bills, indictments, informations, and other criminal proceedings for any offence committed against the Act, shall be brought, sued, and commenced within twelve calendar months next after such offence committed." The Indian Limitation Act IX of 1871, s. 2, repeals s. 16 of Act XX of 1847 to the extent of the words "actions, suits, and bills." It thus repeals the limitation prescribed by that section in the case of civil proceedings, actions, suits, and bills for infringement of copyright; and then by article 11, schedule ii,

enacts, that, in suits for damages for infringing copyright or any other exclusive privilege, the period of limitation is to be one year, beginning to run on the date of the infringement. There can be little doubt, that the intention of the framer of article 11 was to supply the provision repealed in s. 16 of Act XX of 1847, relating to civil suits; and I think we ought to read the words of Act IX as not confined to what is technically known at common law as an action for damages, but as meaning generally every civil suit seeking a remedy for infringement, &c.

We have then also to look at s. 22 of the Patent Act XV of 1859, which enacts that "an action may be maintained by an inventor against any person who, during the continuance of any exclusive privilege granted by this Act, shall, without the license of the said inventor, make, use, sell or put in practice the said invention, &c., provided that no such action shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases, &c." This is the section under which an inventor has his remedy by civil suit for any infringement of his exclusive privilege. The term used "an action" is quite general, and includes every form of suit, whether an action for damages (in the technical sense), or a suit for an account of profits.

In my opinion article 11 of schedule ii embraces any suit or action brought under s. 22 of Act XV of 1859, and there was no intention of drawing any distinction between a suit framed as an action for damages, and one framed as a suit for an account. The taking of an account of profits is only a mode of compensating an inventor for the infringement of his privilege other than by an assessment of damages, and it seems unreasonable, that if the period of limitatiou is one year in the one case, it should be six years in the other. We think, therefore, that the plaintiff is entitled to an account of the profits for one year only from the date of the filing of the plant; and he will have his costs of suit on scale 2.

Attorneys for the plaintiff: Messrs. *Sanderson & Co.*

Attorneys for the defendant: Messrs. *Orr and Harriss.*

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1877
July 20.

RAJ KOOMAR SINGH AND OTHERS (DEFENDANTS) *v.* SAHEBZADA ROY (PLAINTIFF).*

Jurisdiction of Civil Court—Encroachment on Public Thoroughfare—Special Damage—Abatement of Nuisance—Criminal Procedure Code (Act X of 1872), s. 518 et seqq—Right to a Jury—Practice—Conflict of Opinion between individual Judges—Reference to Full Bench.

Where special damage is caused to any person by an obstruction placed upon a public thoroughfare, he is entitled to bring an action in the Civil Court for the purpose of having the nuisance abated, notwithstanding the provisions of s. 518 and the following sections of the Criminal Procedure Code for summary proceedings before a Magistrate, and notwithstanding that he may be entitled to damages.

A question arising from a conflict of opinion between individual Judges is not, properly speaking, the subject of reference to a Full Bench.

The following was the referring order in this case :—

MARKBY, J.—In this case the lower Appellate Court has ordered the defendants to remove an obstruction which they have placed upon a public road near to the plaintiff's house. It is, in my opinion, sufficiently found that the plaintiff has suffered damage by the obstruction, and this not merely as one of the public, but as having his house in the vicinity of the obstruction, so that it causes him a particular inconvenience of a substantial character. But there a decision in the case of *Kistonath Bhagbutty* v. *Jumboonath Chuckerbutty* (1), decided by Ainslie, J., that no order for the removal of an obstruction from a public road can be made by the Civil Court even in such a case as this. On the other hand, there is a decision in the same volume, *Poorobashi Pal* v. *Bhoobun Chunder Dey* (2) decided by Birch, J.,

* Special Appeal, No. 1036 of 1876, against a decree of Moulvi Syed Mahomed Nurul Hosain, Subordinate Judge of Zilla Shahabad, dated the 29th of January, 1876, reversing a decree of Moulvi Dader Buksh, Sudder Munsif of Arra, dated the 11th of April, 1874.

(1) 21 W. R., 145. (2) 21 W. R., 408.

that a decree directing the removal of an obstruction is not erroneous in law.

I have been formally requested by the pleaders to refer this question to the Full Bench, and I do not think that in this state of the authorities I can refuse to do so.

The question referred is, whether, when the Civil Court finds that an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff, it can direct the defendant, who has placed the obstruction there, to remove it ?

If the answer to this question is in the affirmative, in my opinion, the special appeal should be dismissed; if in the negative, the appeal should be allowed, and the suit dismissed with costs in all the Courts.

Moonshi *Mohamed Yusuf* for the appellants.—In the case or *Kistonath Bhagbutty* v. *Jumboonath Chuckerbutty* (1) it was decided that the proper course of procedure for the removal of obstructions to public thoroughfares, is that prescribed in the Code of Criminal Procedure, ss. 518 *et seqq.*, *viz.*, by an application to the Magistrate; and that the fact that a party sustains special damage does not warrant his claiming from the Civil Court that remedy which the law says must be afforded by the Magistrate after taking proceedings in a particular form; that case conflicts, no doubt, with *Poorobashi Pal* v. *Bhoobun Chunder Dey* (2), where it was held that a suit for damages might be brought against a defendant who encroached upon a public thoroughfare, where such encroachment caused the plaintiff damage and inconvenience beyond, and in excess of, what his neighbours suffered. If the plaintiff wished to abate the alleged nuisance he ought to have proceeded under the Criminal Procedure Code. The only suit which he was entitled to bring in the Civil Courts was one for damages and not for abatement of nuisance. By bringing such a suit he has deprived the defendant of his right to have the question, as to whether there was a nuisance or not, tried by a jury—*Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (3). It is not every crime in respect of which a civil action can be instituted; in some cases

(1) 21 W. R., 145. (2) 21 W. R., 408. (3) 3 B. L. R., A. C., 295

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only, both remedies are open. It is for the plaintiff to show that he has a remedy in both the Civil and Criminal Courts. [JACKSON, J.—You have admitted that he has a remedy in a civil action by damages, why shouldn't he have a remedy by having the nuisance removed?] The injury in this case is not sufficient to warrant an order for removal. In Story's Equity Jurisprudence, § 925, it is laid down that "it is not every case which will furnish a right of action against a party for a nuisance, which will justify the interposition of Courts of equity to redress the injury or to move the annoyance; but there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction..... a mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief." The cases of *Abdool Hye* v. *Ram Churn Singh* (1) and *Ramtarak Karati* v. *Dinanath Mandal* (2) were also referred to.

Mr. *M. L. Sandel* for the respondents was not called upon.

The following judgments were delivered by the Full Bench :—

GARTH, C. J.—As this question has arisen from a conflict of opinion between individual Judges (3), it ought, properly speaking, not to have been the subject of reference to a Full Bench. But as the reference has been made, and the question is one of general importance, we have thought it desirable to decide it.

We are of opinion, that as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

(1) 11 W. R., 445.

(2) 7 B. L. R., 184.

(3) *Reporter's Note.*—The rule as to reference to a Full Bench, passed in July, 1867, provides for reference to a Full Bench only where one Division Court differs from another Division Court on a point of law: and a Division Court is, by s. 13 of 24 and 25 Vict., c. 104, the Act establishing the High Courts, to consist of two or more Judges. Here the cases in which there was a conflict of opinion were decisions by one Judge sitting alone.

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The Criminal Code, no doubt, contains provisions for the removal of obstructions in public thoroughfares by summary proceedings before a Magistrate; but there is nothing in those provisions which shows that the Legislature intended to deprive a private individual of the redress which the law affords him under such circumstances by means of a civil suit.

MARKBY, J.—I have nothing to add to the judgment which has just been delivered. I only wish to say that, on further consideration, I concur in thinking that I ought not to have referred this case to the Full Bench.

GARTH, C. J.—The appeal will be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

BHEEKA LALL (PLAINTIFF) *v.* BHUGGOO LALL (DEFENDANT).*

1877 *June* 28.

Res Judicata—Act VIII of 1859, *s.* 2.—*Suit for Specific sum of money.*

In a suit for a specific sum of money, it was held in accordance with the Full Bench decision in *Dinobundhoo Chowdhry* v. *Kristomonee Dossee* (1) that the plaintiff was bound to put forward every right under which he claims.

THIS was a suit for the recovery of Rs. 611-8, being the moiety of Rs. 1,223, the amount of a decree dated the 20th May 1864, and realized by the present defendant alone on the 4th September, 1871.

The plaintiff and defendant were uterine brothers. On the death of their father they inherited, in equal shares, together with other property, a certain shop. In the year 1278 F. S. (1870-71) a partition was effected between the parties, when, among other things, it was agreed that each should be entitled to a moiety of all moneys that might subsequently be received to be recovered on

* Special Appeal, No. 2438 of 1875, against a decree of J. M. Lowis, Esq., Judge of Bhaugulpore, dated 14th August, 1875, reversing a decree of Baboo Burma Dutt, Sudder Munsif of Monghyr, dated the 15th of March, 1875.

(1) I. L. R., 2 Calc., 152.

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decrees obtained on the said joint shop account. On the 4th of September, 1871, the defendant recovered a sum of Rs. 1,223, on a decree passed on the 20th May, 1864. In the year 1872, the plaintiff brought a suit against the defendant, ignoring the partition, for an account of the joint business, which was treated in the plaint as still subsisting, and for the recovery of, among other items, the said sum of Rs. 1,223. That suit was dismissed, and on the 12th of September, 1874, the plaintiff instituted the present suit for the recovery of Rs. 611-8, being the moiety of the said sum of Rs. 1,223, included in the sums already sued for in the previous suit. The plaintiff based his claim on the terms of the partition previously effected with the defendant. The lower Appellate Court held that the suit was barred under s. 2 of Act VIII of 1859. The plaintiff preferred a special appeal to the High Court.

Baboo *Mohiny Mohun Roy* and Moonshee *Mahomed Yoosuf* for the appellant.

Mr. *C. Gregory* and Baboo *Rash Behary Ghose* for the respondent.

The following judgments were delivered :—

MARKBY, J.—At first I was inclined to think that the decision of the Court below was not correct; but, after hearing the argument, I think that decision was right. The plaintiff having been in partnership with the defendant brought this suit upon the ground that there was a partition in the year 1870, under which it was arranged that each should be entitled to a moiety of any decree which should be recovered, and he alleges that the moiety of a certain decree was recovered on the 4th September, 1871, and that, therefore, under that partition he was entitled to a moiety of the sum so recovered.

The defendant answers that the plaintiff had already brought a suit in the year 1872 after this decree was recovered, in which he claimed, together with a number of other items, this very sum for which the present suit is brought. The plaintiff replies to that, that the former suit was not based upon any right which he had under the partition, but upon a general right to an account, alleging that the business continued subse-

quently to the partition: and he maintains that that suit was dismissed solely upon the ground that the Court found that, by the partition, the business was put an end to. That is true. But it is also clear that the plaintiff might, if he had chosen in that suit, have gone on to say that even if he was not entitled to a share in this decree as an item of the general account which he claimed, he still was entitled to it upon the terms of the partition itself, whether the business continued after the partition or not, and he did not choose to do so. Therefore, this is a suit in which the plaintiff having two rights under which he could recover this specific sum of money puts forward only one and claims upon that. And the question is, whether he could then put forward a claim for the same identical sum of money under any other right subsequent to that suit. I think that question is conclusively decided by the Full Bench in *Dinobundhoo Chowdhry* v. *Kristomonee Dossee* (1). It is quite true that that decision relates to a claim to land. But every argument by which it can be maintained that if a man sues for land he is bound to put forward every title of which he was possessed at the time when the suit was brought, applies with equal force to a suit for money. I think it is impossible not to hold after that decision that if a man sues for a specific sum of money, he must put forward every right under which he claims at that time that sum of money. Therefore, the decision of the Court below was right, and this appeal will be dismissed with costs.

PRINSEP, J.—I am of the same opinion. It is quite clear that, in a former suit, the plaintiff made the money now claimed a portion of his claim against the defendant; and that, quite independently of the ground on which that suit was decided, he might and should have insisted on requiring a decree to be given to him at least for his share of the money collected under the decree which forms the subject of this suit. But, instead of contesting the decision of the Court which refused to give him such a decree by appealing against that order, he submitted to it, and he cannot now bring another suit to recover money which he could have obtained in that suit.

Appeal dismissed.

(1) I. L. R., 2 Calc., 152.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877
June 21.

BOYDONATH BAG (DEFENDANT) *v.* GRISH CHUNDER ROY AND ANOTHER (PLAINTIFFS).*

Co-Sharers—Suit for Enhancement of Rent—Non-joinder of Parties—Suit barred by limitation as to added Parties—Act IX of 1871, *s.* 22—*Beng. Act VIII of* 1869, *s.* 29.

In a suit for the recovery of rent at an enhanced rate, brought by two of four brothers, joint and undivided owners of the tenure, the other two brothers, on an objection taken by the defendant that they ought to have been parties to the suit, presented a petition signifying their assent to the institution of the suit, and were thereupon treated as parties to the suit. This application was, however, made after the period of limitation prescribed for such a suit had expired. *Held* by Markby, J., that although the rights of such added parties were absolutely barred, yet the Court could proceed to adjudicate upon and declare the rights of the remaining plaintiffs who had originally filed the suit, and that, as the claim for rent was indivisible, the decree in their favour should be for the whole amount.

By PRINSEP, J.—The objection as to the defect of parties after the case had passed through two Courts, is not one affecting the merits of the case so as to be a ground of special appeal.

THIS was a suit for the recovery of rent for the year 1279 B S. (1872-73), calculated at an enhanced rate in accordance with a notice previously served. The suit was instituted by two of four brothers, the joint and undivided owners of the tenure. At the hearing of the case objection was taken by the defendant to the non-joinder of the other brothers of the plaintiff in the suit, whereupon the two brothers, not originally made parties, put in a petition signifying their assent to the suit. The petitioners were thereupon not formally made parties, but the suit proceeded on the supposition that they were to be considered plaintiffs in the suit. The petition, however, was presented more than three months after the end of the Bengal year

* Special Appeal, No. 2058 of 1875, against a decree of L. R. Tottenham, Esq., Officiating Judge of Zilla Midnapore, dated 17th June, 1875, reversing a decree of Moulvie Enamul Huq, Munsif of Chouk Ghatal, dated 8th December, 1874.

for which the enhanced rent specified in the suit was claimed. Before the lower Appellate Court it was contended by the defendant, appellant, that the original defect of parties could not be cured by the petition put in by brothers of the original plaintiff; and that the prior omission of the four brothers to sign the notice of enhancement was also a total defect. In overruling these objections the Judge said—" I do not think the defect of parties is material to this case. For the remaining two co-sharers with the plaintiff filed a petition assenting to the suit, and the lower Court ought to have added them as plaintiffs. The defendant does not seem in any way to be prejudiced by the omission of their names from the plaint. I think, therefore, that the suit could proceed by virtue of the assent given by the co-sharers. And, similarly, I think that the absence of the signatures of the two co-sharers does not invalidate the notice of enhancement." The defendant preferred a special appeal to the High Court.

Baboo *Mohesh Chunder Chowdhry* for the appellant.

Mr. *C. Gregory* and Baboo *Nobo Kissen Mookerjee* for the respondents.

Baboo *Mohesh Chundra Chowdhry*.—The defect of parties was material, and could not be cured by the petition of the other co-sharers assenting to the suit. The defect (if cured at all) was not cured until the time prescribed in s. 29, Beng. Act VIII of 1869, for the institution of the suit had expired. The right of the assenting co-sharers at any rate is absolutely barred—see s. 22 Act IX of 1871; and this being so, the Court cannot disassociate the interest in the tenure of the four brothers who form a joint and undivided Hindu family, and therefore no decree can be made in respect of the rights of the brothers who were the original plaintiffs in the suit.

Baboo *Nobo Kissen Mookerjee* for the respondents.

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The following judgments were delivered :—

MARKBY, J.—As regards the question of the tenure being protected from enhancement, I do not think that there is any ground for interfering. As regards the other point, the facts seem to be that several persons, members of a joint family, were the owners of this tenure. Some of these persons brought a suit for rent at an enhanced rate. It was objected in the course of the suit that it was wrongly framed, because all the members of the family interested in the tenure were not joined; thereupon the other members of the family came in and expressed their assent to the suit. I take it that what was then done amounts to this,—that although no formal order was then drawn up, still the suit was from that time a suit by all the members of the family. That is how the lower Appellate Court treats it, and that is how we treat it. Now this being a suit for which a very short period of limitation is provided, it turned out that those parties who were subsequently added as plaintiffs were so added after this period of limitation had expired; and under the provisions of s. 22, Act IX of 1871, if after institution of a suit a new plaintiff is added, the suit, as regards him, must be deemed to have been commenced when he was made a party. Therefore, there is no resisting the argument that, as regards the persons who were subsequently added, the suit was commenced after the period of limitation had expired. But then it is said, that for that reason the suit should be dismissed altogether. That really amounts to this, that because two of the parties who joined were barred, therefore the whole are also barred. The law does not say that; and it is not at all a reasonable construction of the statute to hold that. No doubt, it is difficult to see in what cases of a joint claim s. 22 could have any application at all. But I can see no more difficulty in drawing up the decree in this case than there would be in the case in which some of the holders of the tenure, who had refused to join in the suit, might be made defendants. In that case the decree could not be in favor of any person except the plaintiff, nor can there be a decree here in favor of the plaintiffs who are barred; but, nevertheless, the other plaintiffs are entitled to a decree for the rent at the rate

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PRINSEP, J.—As far as I understand the case, the landlords of the defendants are four brothers. Two of them sued the defendants for arrears of rent. An objection was then raised that all the brothers ought to have sued jointly. Thereupon the other two brothers signified to the Court that they had consented to this action having been brought by two plaintiffs. And I understand from that that the two plaintiffs intended to represent the entire estate, and brought the suit as managers of a Hindu family for themselves and their brothers; and that it was only when they became alarmed on an objection raised by the defendants that the other two thought it necessary to come in and signify their consent. The objection as to defect of parties, after the case had passed through two Courts, would not in my opinion be one affecting the merits of the case so as to be a point to be taken in special appeal under s. 372.

As regards the other objection on the point of limitation, I cannot see how a claim of two of the brothers for rent at an enhanced rate could be separated from the claim of the two others. The Limitation Act does not appear to have contemplated such a case as that; and it would be impossible to specify the particular shares of joint owners in such a case. The proper course, in such a case, would have been for the first Court to have thrown out the case for defect of parties. The first Court did not do so, but proceeded to decide it. That being so, I think, in special appeal, we cannot do otherwise than dismiss the appeal.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1877
July 19, 20.

JOGESH CHUNDER DUTT (DEFENDANT) *v.* KALI CHURN DUTT (PLAINTIFF).*

Money paid under process of good decree, Suit to recover—Decree superseded—Review—Act XXIII of 1861, *s.* 11.

In a suit by the present defendant against the present plaintiff for enhancement of rent, the Courts of first instance and the High Court made decrees for enhanced rent. The Privy Council, in the year 1873, reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered and the fixed rent which he was bound to pay. *Held* by MACPHERSON, MARKBY, and AINSLIE, JJ., following *Shama Purshad Roy Chowdry v. Hurro Purshad Roy Chowdry* (1) that the decrees for enhanced rent were superseded, and that such a suit as the present one would lie. *Held* by GARTH, C. J., and JACKSON, J., distinguishing *Shama Purshad's* case (1) that these decrees were not superseded; that the principle of *Marriot* v. *Hampton* (2) applied, and that the plaintiff was not entitled to recover.

THE referring order of Garth, C.J. and M'Donell, J., in, this case was as follows:—

"This was a suit to recover certain sums by way of enhanced rent, which the plaintiff has been compelled to pay the present defendant under certain decrees hereinafter mentioned.

"The facts are these—

"The plaintiff claimed to hold certain property under the defendant at a permanent fixed rent of Rs. 461. The defendants brought a suit against him to enhance that rent, and one of the grounds of defence was, that the rent was not legally capable

* Regular Appeal, No. 212 of 1876, against a decree of Babu Krishna Mohun Mukerji, Roy Bahadur, Officiating Subordinate Judge of the 24-Pergunnahs, dated the 17th April, 1876.

(1) 10 Moore's I. A., 203; S. C., 3 W R., P. C., 11.

(2) 2 Sm. L. C., 375, 6th ed; 405, 7th ed.

of enhancement. The Court of first instance gave the plaintiff a decree for an enhanced rent of Rs. 2,417, and the High Court on appeal affirmed that decree. On appeal to the Privy Council, their Lordships, on the 25th day of March, 1873, reversed the judgments of both Courts, and held that the old rent could not legally be enhanced.

"Meanwhile between the date of the first decree for the enhanced rent and the judgment of the Privy Council reversing that decree, the present defendant brought several suits for the enhanced rent against the plaintiff, and obtained judgment for various sums amounting to Rs. 8,561, which sums were duly paid by the present plaintiff. No application was made by the present plaintiff for a review of those judgments, but on the 25th of November, 1875, this suit was brought by the then plaintiff to recover from the defendant the sum of Rs. 8,561 being the difference between the amount of enhanced rent recovered under those judgments and the amount of the fixed rent, which the plaintiff was bound to pay. The Courts below have given the plaintiff a decree for this difference.

"From this decree the defendant has appealed, and he contends that, according to the well-known rule of law laid down in *Marriot* v. *Hampton* (1), money paid under the judgment of a competent Court cannot be recovered back so long as that judgment remains unreversed.

"The plaintiff, on the other hand, contends that the case of *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Chowdry* (2) is an authority in his favour, and that the judgment for enhanced rent, obtained after the first suit for enhancement was decreed, must be considered as superseded by the judgment of the Privy Council reversing that decree. The case of *Raja Nilmoney Singh Deo Bahadur* v. *Sharoda Pershad Mookerjee* (3) decided by Justices Kemp and Pontifex on 31st December, 1872, seems to favour this view; whereas the case of *Mooraree Mohajun* v. *Mahomed Akmal* (4), decided by Justices Kemp

(1) 2 Sm. L. C., 375, 6th ed., 405, 7th ed.

(2) 10 Moore's I. A., 203, S. C. 3 W R., P. C., 11.

(3) 18 W. R., 434.

(4) 22 W. R., 161

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and Birch, seems opposed to it. See also decision of Phear and Morris, JJ., in *Mewa Lall Thakoor* v. *Bhuphun Jha* (1).

"The point being an important one, and the decisions upon it being apparently conflicting, we think it right to refer this question to a Full Bench: 'Whether the plaintiff is entitled to recover in this suit the difference between the fixed rent and the enhanced rent which he has paid to the defendant under the above circumstances'"

Mr. *J. D Bell* (with him Baboo *Grija Shunker Muzoomdar*) for the appellant.—It is submitted that this case must be governed by the well-established rule laid down in *Marriot* v. *Hampton* (2), and if that rule is to be adopted in this country, money paid under process of a good decree cannot be recovered. The case of *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Chowdry* (3) is against me. But in that case Lord Justice Turner points out that, in ordinary cases, money paid under process of law cannot be recovered. His Lordship says (4):—"There is no doubt that, according to the law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force." So that their Lordships were clearly of opinion that the law on this point is the same in this country as in England. This is a proper case for review under the provisions of Act XXIII of 1861. The eleventh section of that Act provides that questions regarding the amount of mesne profits and interest and sums paid in satisfaction of decrees and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of decree, "shall be determined by order of the Court executing the decree, and not by separate suit; and the order passed by the Court shall be open to appeal." When, therefore, the Court is once seized of a suit, it is not disseized so long as any question arises as to

(1) 22 W. R, 212.

(2) 2 Sm. L. C., 375, 6th ed., 405, 7th ed.

(3) 10 Moore's I. A, 203; S. C., 3 W. R., P. C., 11.

(4) 10 Moore's I. A., 211.

the subject-matter of the suit, even though there has been a decree and execution under it. In the case of *Mooraree Mohajun* v. *Mahomed Akmal* (1) claims for rent were decreed by a Deputy Collector on the basis of a decree for a kabuliat: the latter decree was subsequently set aside on appeal; and it was held that the remedy open to the judgment-debtor under the former decree was to petition the Deputy Collector for a review of his decision. The learned Counsel also referred to *Mewa Lall Thakoor* v. *Bhuphun Jha* (2) and Act VIII of 1859, s. 3.

Mr. *R. E. Twidale* (with him Baboos *Chunder Madhub Ghose* and *Gopal Lall Mitter*) for the respondent.—The case of *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Choudry* (3) concludes this question. Their Lordships, after admitting that the principle of *Marriot* v. *Hampton* (4) applies in this country, go on to say (5) :—"But this rule of law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." [GARTH, C. J.—What does 'superseded' mean? Suppose that there have been two suits, the first for possession, in which a decree has been made for possession; the second for wasilat; and that the first suit has been appealed, and the decree reversed.] Then, I submit, that the decree for wasilat is superseded, and that money paid under it may be recovered. In the case of *Nilmoney Singh Deo Bahadur* v. *Sharoda Pershad Mookerjee* (6) it was decided that a suit for a refund of money realized under a rent-decree founded upon a contract, will lie in

(1) 22 W. R., 161.
(2) 22 W. R., 213.
(3) 10 Moore's I. A., 203, S. C., 3 W. R., P. C., 11.
(4) 2 Sm. L. C., 375, 6th ed.
(5) 10 Moore's I. A., 211.
(7) 18 W. R., 434.

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the Civil Court when that contract (and virtually the decree based upon it) is subsequently superseded and modified by a decree of the Civil Court. The provisions of s. 11 of Act XXIII of 1861 apply to the Civil Courts, and there is no express provision of law of a similar nature with regard to the Collectors' Courts—*Kristo Chunder Goopto* v. *Ramsoonder Sein* (1) and *Hur Dyal Mundul* v. *Tirthanund Thakoor* (2).

Mr. *Bell* in reply.—The proper course for subsequent litigants to take is to apply for stay of execution pending the appeal in the original suit—*Bulkirám Nathurám* v. *The Guzerat Mercantile Association, Limited* (3). This suit is not a suit to set aside decrees, but is merely an action for money had and received, the decrees subsisting. He also referred to *Chowdry Wahed Ali* v. *Mussamut Jumaee* (4).

The following judgments were delivered by the Full Bench:—

AINSLIE, J.—It is obvious, that the defendant has received from the plaintiff, under successive decrees made during the long period that elapsed between the decree for enhancement and the reversal of that decree by the order of Her Majesty in Council, sums of money for enhanced rent, to which the final order in the enhancement suit shows that he is not entitled. The plaintiff as tenant persistently refused to acknowledge his liability, and compelled his landlord to recover the rent by suit, in order, as I understand it, to have a formal record that he only paid it under compulsion. The Courts were bound to follow the existing judgment by which the liability of the plaintiff to pay enhanced rent had been declared. They had no option in the matter at the time. Under such circumstances, I cannot conceive that it was their intention to declare finally that the defendant was entitled to the enhancement for the periods covered by the several suits, irrespective of the result of the appeal to Her Majesty in Council, which was delayed for some fourteen years. The order of Her Majesty in Council was such, that if it had been known at the time of making the decrees,

(1) 17 W. R., 14.
(2) 13 W. R., 34.
(3) 4 Bom. H. C. Rep., A. C., 81.
(4) 11 B. L. R., 149, S. C.; 18 W. R. 185.

they must, of necessity, have gone the contrary way, so far as the enhanced portion of the rent claimed was concerned; and therefore it seems to me, that it did at once supersede the decrees based upon the reserved order of the High Court.

There appears to me to be a wide distinction between the re-opening of decrees based upon, and necessarily controlled by, a previous decree subsequently reversed on appeal; and the re-opening of decrees which the Court making them might have varied had it not thought fit to follow a decree afterwards set aside. Looking at the case of *Shama Pershad Roy Chowdry* v. *Hurro Pershad Roy Chowdry* (1) I am of opinion that there is authority for saying that the former class of decrees are *ipso facto* superseded so soon as the controlling decree is nullified, and that what may have been done under them is not final, but may be undone; the mode of proceeding for this purpose is not a question of serious importance. I agree with the judgment of Mr. Justice Macpherson.

MACPHERSON, J. (MARKBY, J., concurring).—In my opinion the principle on which the Privy Council acted in the case of *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Chowdry* (1) is applicable, and the plaintiff is entitled to recover the difference between the rent for which he was really liable and the enhanced rent which he paid pending his appeal against the decree by which the rent was enhanced. That decree (although in a suit instituted in 1859 before Act X came into force) was made by the Principal Sudder Ameen on the 29th of June, 1863. Appeals to the Judge of the district ad to this Court were decided on the 18th of June, 1864, and the 6th of February 1865, respectively. An appeal to the Privy Council was filed here on the 20th of July, 1865, and was finally disposed of by the decree of the Privy Council of the 5th of May, 1873, which reversed the decisions of the Courts in this country, and found that the rent was not liable to enhancement.

I assume that the plaintiff is in equity and good conscience entitled to have the whole of the rent which he paid at the enhanced rate refunded to him. All these decrees for the

(1) 10 Moore's I. A., 203, S. C., 3 W.R., P C., 11.

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enhanced rent were based solely upon the decree for the enhancement which the Privy Council reversed in May, 1873, and the only question to be decided now is, whether the plaintiff (if he has any remedy at all) is technically wrong in the remedy which he seeks.

The contention is, that as these subsequent decrees for rent at the enhanced rate are still unreserved, a suit will not lie to recover the money paid under them. It is suggested that though our Courts had decided that the rent could be enhanced, the defendant ought not to have submitted to these latter decrees, but should have contested each case, and appealed, if necessary, to the Privy Council in each ; and it is also said that he should apply, or should, on the Privy Council making its order in May, 1873, have applied, for a review of judgment in each of the sixteen cases, and having got the judgments reviewed and reversed should obtain restitution in each suit.

In thirteen out of the sixteen suits the decree was for a sum under Rs. 1,000 (and in seven of them it was for less than Rs. 500), and I should hesitate before declaring that, in the circumstances in which the plaintiff was placed, he was bound to appeal all these suits and incur the enormous expense necessarily involved in such a course—an expense far exceeding the amount in dispute. As to applying for a review in each case, it is exceedingly doubtful, to say the least of it, how far a review could be obtained, or could at any time have been obtained, in the cases under Act X of 1859. Even supposing it obtainable in the four cases under Bengal Act VIII of 1869. But if it be granted that a review might have been obtained in each of the sixteen suits, that mode of proceeding would have been, on the whole, much more cumbrous and inconvenient than the single suit which the plaintiff has instituted embracing his whole claim ; of course these questions of convenience and the like could not be taken into consideration at all if there were any fixed rule prohibiting this suit from being brought. It seems to me, however, that not only is there no such fixed rule, but that the Privy Council has expressly decided in *Shama Purshad Roy's* case (1)

(1) 10 Moore's I. A., 203 ; S. C., 3 W. R., P. C., 11.

that a suit such as this may properly be entertained by this Court. In their judgment it is said:—"There is no doubt that, according to the law of England, and their Lordships see no reason for holding that it is otherwise in India, money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force. But this rule of law rests, as their Lordships apprehend, upon the ground that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." Applying that rule to the case before us, I think that the original decree (which is the sole basis of all the decrees made pending the appeal) having been reversed by the Privy Council, all the subsequent decrees were superseded by the Privy Council's order. It was painly intended by the Privy Council's order, which decided that the rent of this tenure could not be enhanced, that the plaintiff should not pay rent at any rate higher than that for which the tenure was declared to be liable; and it is practically a contravention of the order to permit the decrees obtained by the zemindar pending the appeal to interfere with that intention. The subsequent decrees were mere subordinate and dependent decrees, and they cannot, under the circumstances of this case, be held to have remained in force so far as the enhanced rate of rent was concerned, when the decree on which they were dependent has been reversed. I am aware that in *Shama Purshad Roy's* case (1) the order made by the Privy Council turned in some decree on the peculiar terms of their original order. But giving full weight to that fact, it seems to me clear that their Lordships admit the principle that the main decree being reversed, which was the basis of the subsequent decrees,

10 Moore's I. A., 203; S. C, 3 W. R., P. C., 11.

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these latter, being subordinate and dependent decrees, were superseded. It cannot be disputed, that although the latter and subordinate decrees remained unreversed, the Privy Council held that a separate suit lay to recover what had been wrongfully paid under those decrees, and this was evidently the view taken of the effect of *Shama Purshad Roy's* case (1) by Kemp and Pontifex, JJ., in the case of *Nilmoney Singh Deo Bahadur* v. *Sharoda Purshad Mookerjee* (2).

The question of limitation is not raised in the order of reference. But I incline to agree with the Subordinate Judge (and substantially for the reasons given by him) in thinking that the suit is not barred.

The circumstances of this case are peculiar, and it is impossible in dealing with it to lay down any rule of very general application. The plaintiff has practically no remedy unless this suit will lie.

GARTH, C. J. (JACKSON, J., concurring).—I am of opinion that the decree made by the Privy Council in the case of *Ram Churn Dutt* v. *Romesh Chunder Dutt* did not supersede or modify the several decrees which had been previously obtained for enhanced rent by the present defendants, and consequently that the plaintiffs in this case are not entitled to recover.

The plaintiffs base their claims entirely upon the authority of the case of *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Chowdry* (1) contending that the principle upon which that case proceeded applies to the present, and that the decrees for enhanced rent obtained by the present defendant since the year 1864 have been partially superseded or modified by the decree of the Privy Council in the above case of *Ram Chunder Dutt* v. *Romesh Chunder Dutt.* We are bound, of course, to accept the decision in *Shama Purshad Roy Chowdry* v. *Hurro Purshad Roy Chowdry* (1) as binding upon this Court, so far as it goes; but if the principle of it is to be extended, as the plaintiffs contend it ought to be, it would lead, in my opinion, to very inconvenient consequences, and to a direct departure from a

(1) 10 Moore's I. A., 203, S. C., 3 W. R., P. C 11.
(2) 18 W. R, 434.

rule of law which has been established for years, and has always been acted upon in England and in this country.

Now, in order to see how far the authority of the case of *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry*(1) is applicable to the present, it is necessary to ascertain, in the first place, what the grounds of that decision really were. The case was a very peculiar one. In the year 1821, Doorga Purshad, claiming to be heir to his uncle, brought a suit against Shama Purshad, a debtor to his uncle's estate, for Rs. 23,024, the principal and interest due upon a bond.

Pending this suit, Tara Purshad sued Doorga Purshad for one half of the uncle's property; and in 1829 a compromise was effected of that suit, under which Tara Purshad became entitled to a 6-anna share of the debt due from Shama Purshad.

Subsequently to this Doorga Purshad obtained a decree against Shama Purshad for the principal and interest due upon the bond. From this decree Shama Purshad appealed to the Sudder Court, and pending that appeal in 1831, there was a compromise of that suit also, under which Shama Purshad was to pay Rs. 27,127 at the end of three years, without interest; in default of which payment Doorga Purshad was to be at liberty to realize the amount. This compromise was made without Tara Purshad's knowledge, and Shama Purshad did not pay the stipulated amount at the end of the three years.

In this state of things Tara Purshad, in March, 1835, brought another suit against Doorga Purshad, claiming a 6-anna share of the bond-debt and interest due up to the commencement of Doorga Purshad's first suit in 1821; and in his plaint he reserved to himself the right of bringing another suit for his share of the interest upon the bond-debt from 1821 to the 27th May, 1829, on which day Doorga Purshad obtained his decree against Shama Purshad.

This suit was carried through the Courts of this country up to the Sudder Dewany Adawlut, where eventually a decree was made against Doorga Purshad for the entire amount of principal and interest sued for.

(1) 10 Moore's I. A., 203; S C., 3 W. R., P C., 11.

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From this decree Doorga Purshad appealed to the Privy Council, who decided in 1849 that the decree of the Sudder Court ought to be reversed, and that Doorga Purshad was not liable to Tara Purshad for the whole amount of his 6-anna share and interest of the debt. Their Lordships held that Doorga Purshad ought to be considered as a trustee for Tara Purshad, and was only responsible for so much of the debts as he actually received, or without his wilful default might have recovered, and an order was made accordingly by their Lordships that the decree of the Sudder Dewany Adwalut should be reversed; that Doorga Purshad should be declared liable to Tara Purshad for a 6-anna share of what he had received or might thereafter receive, or what he might have received but for his wilful default, for and in respect of the sum of Rs. 24,217-12-17, and the interest thereon, and the case was referred back to the Sudder Dewany Adawlut to ascertain and carry out and enforce the rights and liabilities of the parties as above declared.

From the 11th of March, 1835, when the above suit was commenced, to the 5th July, 1849, when the judgment of the Privy Council was pronounced, upwards of fourteen years have elapsed; and during that interval, in the year 1842, an action was brought in this country by Tara Purshad against Doorga Purshad to recover Rs. 4,392-12-9, being the amount of interest on the 6-anna share of the bond-debt, for which in his previous proceedings he had reserved his right to sue; and in this action he obtained a decree for the Rs. 4,593-12-9, with interest at 12 per cent., amounting to Rs. 11,127-15-3, which he accordingly paid thus—Rs. 8,200-7-3 on the 28th of April, 1848, and Rs. 2,927-8 on the 4th August, 1857.

Several attempts were made by Doorga Purshad to have this decree for interest dealt with and adjusted by the Sudder Dewany Adawlut as part of the entire subject-matter of the first suit upon which the Privy Council had passed their judgment; but failing these attempts, he brought a suit against Tara Purshad to recover back the Rs. 11,127-15-3, which he had been unjustly compelled to pay. This was decided against him by the Courts of this country and was taken on appeal to the Privy Council, where the judgment was given, which has been

the subject of so much discussion, and which is insisted upon here by the plaintiff as a conclusive precedent in his favour.

Their Lordships in that case distinctly affirmed the well-known principle of law, that in this country as in England money recovered under a decree of judgment cannot be recovered back in a fresh suit so long as the decree or judgment under which it was reversed remains in force. They go on to say, that this rule of law rests upon the ground that the decree or judgment must be considered as subsisting until it has been reversed or superseded by some ulterior proceedings. But where it has been so reversed or superseded, the money paid under it may be recovered back.

Their Lordships then go on to say, that the decrees in this country under which the sum of Rs. 11,127-15-3 was recovered were in fact superseded by the order of Her Majesty in Council in 1849. That order they considered extended not only to the claim of the plaint in the particular suit in which it was made, but to the adjustment of the rights and interest of the parties in the entire subject-matter of that suit. The order had declared Doorga Purshad to be a trustee for Tara Purshad of the whole 6-anna share of the bond and interest, and it had directed the Sudder Dewany Adawlut to adjust and enforce the rights and liabilities of the parties in accordance with the directions of the Privy Council. If this order had been obeyed by the Sudder Dewany Adawlut, as their Lordships say, it ought to have been the interest in question, Rs. 11,127-15-3, would have been refunded to Doorga Purshad by the order of the Sudder Dewany Adawlut under, and by force of, their Lordship's previous decree, because that decree had superseded and annulled what their Lordships call the "dependent and subordinate decree" which had been obtained for the interest. But as the Sudder Dewany Adawlut failed to take any steps to carry out the directions of the Privy Council, their Lordships considered that the Rs. 11,127 were recoverable by a fresh suit, and they, accordingly, reversed the decree of the Sudder Court and adjudged to the plaintiff that amount with interest at 12 per cent.

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Now two things appear to me clear from this judgment, first, that the Privy Council had no intention of questioning the authority of the rule laid down in *Marriot* v. *Hampton* (1); on the contrary, they distinctly affirm it, because they say that as long as the decree or judgment under which money has been obtained remains in force, no money paid under it can be recovered back; and, secondly, that their Lordships' judgment is based entirely upon this principle, viz., that the effect of the order of Her Majesty in Council made in 1849 was not only to reverse the judgment in the case which was then *sub judice*, but also to supersede and annul *ipso facto* the decrees which had been made in another suit.

I have searched in vain to find any other instance in which the decree of an Appellate Court in one suit has been held to have the legal effect of annulling or altering *ipso facto* a decree made by a subordinate Court in another suit; but of course we are bound here to treat the decision of the Privy Council as binding upon us as far as it goes, and to deduce as carefully as we can from the language of the judgment what was the ground upon which their Lordships considered that the order made in the first suit in 1849 had the effect of superseding the decree for Rs. 11,127 interest.

It appears to me that the only explanation of the apparent difficulty is this,—that, in the decree of 1849, their Lordships assumed to deal, and were in fact dealing, not only with the actual claim made in the suit, but with the status and rights of the parties with reference to the whole subject-matter of it. They declared that Doorga Purshad was a trustee of Tara Purshad upon certain terms and conditions, and they directed the Court here to adjust the rights and liabilities of the parties in accordance with that declaration: and as the interest of the bond (Rs. 11,127) formed part of the fund in respect of which the trust had been declared, their Lordships considered, that although a decree had been obtained in the Courts here for the interest, that decree was as much dealt with and superseded by their judgment as the decree which had been made with reference to the remainder of the bond-debt. Upon this

(1) 2 Sm. L. C., 375, 6th ed.; 405, 7th ed.

ground, and upon this ground only, it appears to me their Lordships' judgment proceeded; and I do not understand that they intended to overrule the principle laid down in *Marriot* v. *Hampton* (1), or to prescribe a different rule of equity in this country from that which obtains in England.

It does not appear to me that their decision can be considered as governing the present case, unless we can find that the decree made by their Lordships on the 25th of March, 1873, reversing the first judgment for the enhanced rent, had the legal effect *per se* of surperseding or modifying the subsequent decrees for enhanced rent obtained between the year 1864 and the 25th of November, 1875.

Now, on looking at the language of their Lordships in that decree, I cannot discover that they dealt, or intended to deal, with anything else than the actual subject-matter of the suit upon which they were engaged. Their judgment involves no change in the mutual relation of the parties. Their Lordships give no directions to the Courts of this country as to adjusting the parties' rights or liabilities. They simply decide the question, whether or no the plaintiff was or was not entitled to enhance the plaintiff's rent, so that unless we are to hold that in every case the decree of an Appellate Court has the effect of superseding or modifying every other decree inconsistent with it which may have been made between the same parties in any other suit brought in a subordinate Court upon the same subject-matter, I do not see how we can consistently say that the decree of the Privy Council of the 25th March, 1873, has superseded or modified the subsequent decrees for enhanced rent obtained by the present defendant.

It will be observed, that in the case of *Doorga Purshad* against *Tara Purshad* the decree, which was superseded by the judgment of the Privy Council, was for interest which that judgment had declared not to be payable, and which their Lordships had in fact directed the Sudder Dewany Adawlut to restore to Doorga Purshad; so that the effect of Her Majesty's order according to the view which their Lordships took of it, was to supersede the decree for interest altogether.

(1) 2 Sm. L. C., 375, 6th ed.; 405, 7th ed.

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But here the case is very different. Their Lordships here have given no direction which could have the effect of superseding or altering any other decrees ; and it is not contended that these subsequent decrees are absolutely superseded. It is said that they are only modified ; or, in other words, that the Privy Council judgment has had the effect *per se* of altering a judgment for one sum into a judgment for another sum.

But if that is so, and if this principle is to be consistently carried out, the amount of costs ought to be altered also. The doctrine is certainly a novel one, and if we are to apply it in all cases, as of course we must (if we are to act consistently) it will be attended with some strange consequences. The rule, if it is to be applied in the case of one of the parties, must be applied also in the case of the other ; thus if in a suit like the present a claim can be made by the tenant to recover sums which he has overpaid to the landlord, the landlord ought to have a corresponding remedy if the state of things were reversed. Suppose, that in the original suit the Courts here had decided that the landlord was not entitled to the enhanced rent, but the Privy Council overruled that judgment, and decided that he was so entitled ; and suppose also, that pending the appeal to the Privy Council, the landlord had brought several suits for the enhanced rent, but in each had only recovered the original rent ; if the above principle is to be carried out, the landlord would be entitled, in a fresh suit, to recover the enhanced rent which he had failed to recover in his subsequent suits here, and to which the Privy Council had declared him entitled.

So again, if the rule is to apply to cases of landlord and tenant, it must apply to all other cases where the relative rights of parties are determined in one suit, and claims founded on those rights are enforced in subsequent suits. The case of *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry* (1) was not a case between landlord and tenant.

Thus, for instance, A sues B to recover the value of coal which he claims as having been taken out of his coal mine. The question depends upon whether B has a right to take the coal

(1) 10 Moore's I. A., 203 ; S. C., 3 W. R., P. C., 11.

from a particular area; and A obtains a decree for damages upon the ground that B has no such right. B appeals to the High Court: meanwhile B continuing to take the coal, A brings another suit against him for damages, and recovers. The High Court reverses the original decree: B may then sue for the damages, which he has paid in the second action, as money had and received to his use.

But if this is to be law, the converse proposition ought to hold good also,—that is to say, suppose the decree in the first suit to be in favour of B, on the ground that B had a right to get the coal and A appealed, and pending the appeal A brought another suit against B and failed upon the same ground. The Court of appeal reverses the final decree. Surely A ought to be entitled to recover by fresh suit the value of the coal which was due to him in the second action. It would be a palpable injustice to allow one party to avail himself of the judgment of the Appellate Court, and not the other.

In the cases above mentioned, the question as to the sum to be recovered would be tolerably simple. But suppose a case of this kind: A sues B for damages for building a house upon two pieces of land which he claims, Black-acre and White-acre, the question is, whether B has any right to do this. The Court decides that he has not, and awards damages to A. B appeals. Meanwhile, the building still going on, A brings a fresh suit for damages, which he has a right to do for the continuing trespass and recovers further damages. The Court of appeal reverses the first judgment in part, upon the ground that B had a right to build on Black-acre, but not on White-acre, and reduces the damages accordingly. Can B sue to recover part of the damages incurred in the second action? and if so, what part, and how is the amount to be ascertained? In other words, to what extent, if at all, has the judgment of the Appellate Court superseded or altered the decree of the subordinate Court? Then again, it must be borne in mind that if a decree of one Appellate Court is to have the effect of reversing or altering decrees in other suits, the same effect must be given to a decree of any other Appellate Court under similar circumstances. The decree of the Privy Council as an Appellate Court cannot

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have a different effect from that of the High Court or the District Court, or the Court of the Subordinate Judge in its appellate capacity.

Thus, suppose that in a suit by a landlord against a tenant for enhanced rent, the Munsif gives the plaintiff a decree. The case is appealed to the Subordinate Judge, who reverses the Munsif's judgment. Meanwhile a second decree has been obtained before the Munsif for the enhanced rent, and the tenant has paid the amount. The tenant, under these circumstances, would be enabled by force of the judgment of the Subordinate Judge, to recover from the landlord the amount which he has overpaid under the second decree. But the landlord then takes the Subordinate Judge's judgment upon special appeal to the High Court; and the High Court reverses that judgment, and affirms the Munsif's. The consequence would be that the landlord would be entitled to recover in a third suit the sum which he had previously recovered from the tenant in the second suit.

If this state of the law is to prevail in this country, it is difficult to see where litigation is to stop; or when people's rights are even to be considered as finally determined. If in cases like the present it is right that the English rule should be departed from at all. It appears to be that a review of judgment would be not only the most complete, but the most appropriate and unobjectionable remedy; but this point we are not asked to decide in the present reference.

The only question before us is, whether the present suit will lie; and I am strongly of opinion that it will not. I consider that it does not come within the principle of the case of *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry* (1) decided by the Privy Council; and I cannot help deeply regretting the conclusion at which the majority of my learned brethren have arrived.

It is a conclusion directly opposed to what I consider a valuable and well established rule of law; and I believe that it will be attended with most inconvenient and mischievous consequences.

(1) 10 Moore's I. A., 203; S. C., 3 W. R., P. C., 11.

The case will be sent back to the Division Bench for final disposal, and speaking only for myself, I trust that the very serious question involved in the case may be taken upon appeal to the Privy Council.

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PRIVY COUNCIL.

THE DELHI AND LONDON BANK, LIMITED (JUDGMENT-CREDITORS) *v.* ORCHARD (JUDGMENT-DEBTOR).

P. C.* 1877 *April* 18, 19, *&* *May* 14.

[On Appeal from the Chief Court of the Punjab.]

Limitation (Act XIV of 1859*), ss.* 20, 21—*Execution of Decree—Interpretation of Statutes—Res-judicata—Act VIII of* 1859, *s.* 2.

A decree was obtained in the Court of the Deputy Commissioner of Delhi on the 5th October, 1866, prior to the date when Act XIV of 1859 was extended to the Punjab, *viz*, the 1st of January, 1867. On the 22nd of October, 1869, an application admittedly *bonâ fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order. A subsequent application for execution was made on the 4th of May, 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court confirmed this order. *Held*, reversing the decision of the Court below, that execution of that decree was not barred by s. 21, Act XIV of 1859.

In interpreting statutes, the words 'must' and 'shall' may in some cases be substituted for the word 'may,' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural, *i. e.*, in a permissive, and not in an obligatory, sense.

In construing s. 21, Act XIV of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act: and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire.

**Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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An order passed by a Court rejecting a *bonâ fide* application by a judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution had expired, *held* not to be an adjudication within the rule of *res-judicata*, or within s 2, Act VIII of 1859.

THE appellants in this case obtained a decree against the respondent in the Court of the Deputy Commissioner of Delhi on the 5th October, 1866, and on the 22nd October, 1869, applied to the Deputy Commissioner to have the decree transferred to the Civil Court at Meerut for execution. This application was refused by the Deputy Commissioner on the 10th December, 1869, on the ground that, as the decree was of date prior to the 1st January, 1867, when Act XIV of 1859 was extended to the Punjab, the period within which it could have been executed was, under the law of the Punjab, one year only, unless leave to extend the time had been obtained from the Commissioner, and such leave had not been obtained. No appeal was brought against this order.

A subsequent application for execution, made on the 4th May, 1871, was likewise rejected by the Deputy Commissioner, whose order was confirmed by the Commissioner of Delhi on the 18th August, 1871, and afterwards, on appeal, by the Chief Court of the Punjab. But on a review of their judgment, on the 17th March, 1873, the Chief Court held that the effect of the application of the 22nd October, 1869, was to keep the decree alive, and that the subsequent application having been made within three years from the date of the first, was in time under the provisions of s. 20, Act XIV of 1859. Subsequently, however, on the 31st July, 1874, on a second review of their judgment, a majority of the Judges of the Chief Court (Messrs. Boulnois and Melvill, Mr. Thornton dissenting) reversed the order of the 17th March, 1873, and restored the order of the Commissioner of Delhi, dated the 18th August, 1871, which declared the application to be barred.

The cases which were before the Court were conflicting, *viz.*, on the one hand, *Bai Udekwar* v. *Mulji Naran* (1) and *Makunda Valad Balacharya* v. *Sitaram* (2), decided by the Bombay High Court,

(1) 3 Bom. H. C. Rep., A C., 177. (2) 5 Bom. H. C. Rep., A. C. 102.

in which it was held that ss. 20 and 21 must be read independently of each other; and that in the case of a judgment, decree, or order in force at the time of the passing of Act XIV of 1859, the creditor must, within the time limited by the Act, do all that is necessary to procure process of execution to be issued, and that if he failed to do so, the decree could not be executed; and on the other hand, *Kangaleechurn Ghosal* v. *Bonamalee Mullick* (1), decided by a Full Bench of the Calcutta High Court, and certain cases in that Court in which that decision had been followed (2), in which it was held that ss. 20 and 21 must be read together and that process of execution of a decree obtained before the passing of Act XIV of 1859 may be issued within the time mentioned in s. 21, without any prior proceeding having been taken, but when it is sought to execute such decree after three years from the time of the passing of the Act, process of execution shall not be issued unless some proceeding within the meaning of s. 20 shall have been taken to enforce the decree within three years next preceding the application for execution; and the case of *Karuppanan* v *Muthaman Servey* (3), in which the view of the Calcutta Court was followed. The case of *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (4), decided by a Full Bench of the Calcutta High Court, was also relied upon as supporting this interpretation of the Act

Mr. Boulnois and Mr. Melvill, in accordance with the view taken by the Bombay High Court, allowed the review, holding that process of execution was barred

Mr Thornton, the dissentient Judge, followed the construction put on ss. 20 and 21 by the Calcutta High Court.

The Chief Court of the Punjab having refused to certify the case as a fit one for appeal, the appellants petitioned Her Majesty in Council for special leave to appeal, which was granted under an order dated the 28th July 1875.

(1) B. L. R., Sup Vol., 109.

(2) See *Gregory* v. *Juggat Chunder Banerjee*, 5 W. R., Mis, 17, *Doorgachurn Roy* v *Dinomoyee Debia*, 6 W. R, Mis., 14, *Huronath Bose* v. *Muddun Mohun Chuckerbutty*, 6 W. R., Mis, 40; *Nawaraja Chowdhry* v. *Ram Kanaye Doss*, 7 W R, 330.

(3) 5 Mad, H C Rep, 105

(4) 4 B. L. R., F. B, 82

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Mr. *Leith*, Q.C, and Mr. *Graham* for the appellant.—According to the true construction of Act XIV of 1859, the appellants were not barred from having execution against the defendant on this decree, which was in full force at the time when execution was applied for. The interpretation put on the Act by the Chief Court of the Punjab is erroneous. Having regard to the general intent of the Act, and the sections immediately preceding s. 21, it was clearly not meant to take away the remedy on judgments in force when the Act passed or came into operation, or to place these judgments in a worse position than those obtained after the Act began to operate. The words in s. 21—" nothing in the previous section shall apply to judgments in force at the time of the passing of this Act,"—must be interpreted to mean that nothing in s. 20 should apply prejudicially to existing judgments. That was the only reasonable construction which could be put on the language of the Act, and was the one adopted by the Calcutta High Court in the case of *Kangaleechurn Ghosal* v. *Bonomalee Mullick* (1). When three years from the time when Act XIV of 1859 passed had expired, the benefit conferred by s. 21 was lost to the holders of old decrees, who had then only the provisions of s. 20 to look to. By Act XIV of 1870, which repeals a variety of enactments which had become obsolete or useless, the Legislature repealed s. 21 of Act XIV of 1859. It clearly would not have done so had it not considered that all old decrees had by that time either become inoperative or had been brought within the operation of s. 20. The Bombay decisions which would read 'may' in the second sentence of s. 21 as 'must' were opposed to the view followed in the decisions of the Calcutta and Madras High Courts, and were opposed to the most approved rules for the interpretation of statutes; as to which, see Maxwell on the Interpretation of Statutes, p. 209, and Baron Parke's observation in *Becke* v. *Smith* (2); see also *Roddam* v. *Morley* (3). As to the proceedings sufficient to keep a decree alive, see *Maharajah Dheraj Mahtab Chand Bahadoor* v.

(1) B. L. R., Sup. Vol., 709. (2) 2 M. & W. at p. 195.

(3) 26 L. J., N. S., Ch., 438.

Bulram Singh (1) and *Kristo Kinkur Roy* v. *Rajah Burrodacaunt Roy* (2).

Mr. *Doyne* for the respondent.—The final order of the Punjab Court was right in law, and should be confirmed. The appellants' application for execution on the 22nd October 1869 was rejected by the Deputy Commissioner as out of time. The appellants took no steps to dispute that ruling No appeal was brought against the order of the Deputy Commissioner, which, consequently, became final. There being thus a previous adjudication to the effect that execution was barred, the application to execute could not be renewed. The matter was *res judicata.*

Apart from this objection, the second application was clearly inadmissible. The decree sought to be executed was governed either by the Punjab Code, which fixed one year as the period within which execution should be applied for, or it was governed by the provisions of Act XIV of 1859, which had been extended to the Punjab on the 1st January 1867, and under which a period of three years from the date of such execution was fixed as the limit for execution. As held by the High Court of Bombay, the plain words of s. 21 of the Act declare that the extension of time which may be had under s. 20 in the case of judgments obtained after the passing of the Act do not apply to judgments obtained before the passing of the Act; the words "passing of the Act" being in this case understood as equivalent to the extension of the Act to the Punjab. The appellants, whose judgment dates from October 1866, in applying for execution in May 1871, can have no benefit from the proceedings taken in October 1869, because s. 21 gives no effect to such proceedings as keeping alive the decree. Since, under s 21 of Act XIV of 1859, three years was an absolute limit to the appellants' right to execute, it made no difference that at the time of the second application for execution that section had been repealed by Act XIV of 1870. The period of three years had run against the appellants in January 1870, they had suffered a bar

(1) 13 Moore's I. A., 479.

(2) 14 Moore's I. A., 465; S. C., 10 B. L. R., 101.

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of their right to execute, and it was expressly provided by the repealing Act that it should not affect the validity of anything already suffered.

Mr. *Leith* in reply.—There was no abandonment of the proceedings to enforce execution under the application of October 1869. An arrangement was come to with the defendant under which further payments were received from him. That was a sufficient reason for not appealing against the order of the Deputy Commissioner. [Sir J. COLVILE.—If these payments did not keep your decree alive, your sufficient reason is gone.] There is no ground for saying that our proceedings were not *bonâ fide*. As to the contention that our application is in a matter already adjudicated, there is no decision to bring the case within the rule as to *res judicata*. If s. 21, Act XIV of 1859, restricted the period for executing decrees obtained before the Act was extended to the Punjab to three years from the date of such execution, that limit had at the time of our second application to execute been swept away by Act XIV of 1870. [Sir M. SMITH.—Not if you had already suffered a bar of your remedy.] We shall have the advantage of what we have done, and are safe under s. 20, Act XIV of 1859.

Cur. adv. vult.

The judgment of their Lordships was delivered by

SIR B. PEACOCK.—This is an appeal from a judgment and order of the Chief Court of the Punjab, dated the 31st July 1874, reversing on review a former judgment and order of the same Court of the 17th March 1873, and thereby disallowing the executing of a decree obtained by the appellants against the respondent for the recovery of a sum of Rs. 14,408-14 for debt and costs.

The judgment was recovered on the 5th of October 1866 in the Court of the Deputy Commissioner of Delhi. Subsequently to the decree, the defendant made various payments on account up to the month of October 1869. On the 22nd of that month the plaintiffs presented a petition to the Deputy Commissioner, claiming a balance of Rs. 19,227-3 for

principal and interest, and praying that, after ascertaining the amount to be recovered, a certificate might be sent to the Civil Court at Meerut, transferring the decree, in order that it might be executed in that Court.

It is unnecessary to refer particularly to all the proceedings which took place on that petition; it is sufficient to say that on the 10th of December 1869, the Deputy Commissioner made the following order:—"The decree is of a prior date to the introduction of Act XIV of 1859. It should be executed according to the civil law of the Punjab: and as, according to the said law, the period of one year was fixed for its execution, and in case that period expires, the rule is that the decree should be executed by obtaining the sanction of the Commissioner; and as on the report sent for obtaining sanction the Commissioner did not pass any order either giving sanction or any other order, and as it is not within the power of this Court to execute such a decree, it is ordered that the petition be sent to the record-room."

There can be no doubt that the application made on the 22nd October 1869 was *bonâ fide*, and, indeed, the learned Counsel for the respondent has very properly admitted that it was so.

No appeal was preferred from the order of the 10th December 1869, but the defendant, notwithstanding the order, made further payments on account.

On the 4th May 1871, the plaintiffs, alleging that the payments made were not sufficient to cover the interest, and claiming a balance of Rs. 23,772-13-7, made a fresh application to the Deputy Commissioner for a certificate and transfer of the decree to the Court of Meerut for execution, and prayed that a summons might be issued under the provisions of Act VIII of 1859. Upon that petition the Deputy Commissioner, on the 6th May 1871, made the following order:—"As the application for execution has already been rejected and sent to the record-room, and now the period for execution has expired totally, it is ordered that the application be rejected and sent to the record-room."

With reference to the statement that the period for execution had totally expired, it may be as well to point out

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that Act XIV of 1859 was extended to the Punjab on the 1st January 1867, and consequently that the period of three years from the time when the Act came into operation in the Punjab had expired before the application of the 4th May 1871 was made. On the 30th June 1871, the Deputy Commissioner refused to review his judgment, and on the 10th July of that year the plaintiffs appealed to the Commissioner, who on the 18th August 1871 dismissed the appeal, holding, amongst other things, that the three years' grace under the limitation law expired on the 1st January 1870, and that a mere petition for execution which was dismissed was not sufficient to keep a decree in force.

The case was appealed to the Chief Court of the Punjab, which at first rejected the appeal. Subsequently, a Full Bench of that Court, on the 17th of March 1873, upon review, decreed the appeal with costs, and reversing the orders of the lower Courts, ordered and decreed the appellants' application for execution with costs and the costs of the appellants in the Appellate Court. They said:—"The application for execution in 1869 to the Assistant Commissioner at Delhi was, in the opinion of this Court, a *bonâ fide* proceeding to enforce the decree of 1866. It was a proceeding to enforce the decree, and not merely to keep the decree in force. Beofre the expiration of three years from the date of that proceeding the present application was filed."

Subsequently, on the 31st July 1874, upon a review of the judgment so given on review, the Chief Court reversed their decree of the 17th March 1873, upon the ground that the decree having been obtained before the introduction of Act XIV of 1859 into the Punjab, the case must be governed by the provisions of s. 21, and not by s. 20. The case was decided by Mr. Justice Boulnois and Mr. Justice Melvill upon the authority of the cases of *Bai Udekwar* v. *Mulji Naran* (1) and *Makunda Valad Balacharya* v. *Sitaram* (2). Mr. Justice Thornton held a contrary opinion, and recorded his reasons for dissent. It was not contended that the decision of the

(1) 3 Bom. H. C. Rep., A. C., 177. (2) 5 Bom. H. C. Rep., A. C., 102.

Chief Court of the 17th March 1873 was incorrect for any other reason than that afforded by the words of the 21st section of the Act.

The case depends upon the proper construction to be put on ss. 20 and 21 of Act XIV of 1859. The following are the words of those two sections:—

"20. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, as to keep the same in force, within three years next preceding the application for such execution."

"21. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued, either within the time now limited by law for issuing process of execution thereon, or within three years next after the passing of this Act, whichever shall first expire."

It was pointed out in the case of *Ram Sahai Sing* v. *Sheo Sahai Sing* (1) that, according to the literal wording of s. 20, no process of execution could ever issue to enforce a judgment, even within a week from the date of it, unless some proceeding had been taken to enforce or keep it in force within three years next before the application for execution; and it was held that such a construction was obviously insensible, and that the meaning of the section was that no process of execution should be issued to enforce a judgment or order of a Court not established by Royal Charter after the expiration of three years from the date of it, unless some proceeding to enforce it, or to keep it in force, should have been taken within three years next before the application for such execution. That was held to be the proper construction of s. 20, both in that case and in the subsequent Full Bench case of *Kangalee Churn Ghosal* v. *Bonomalee Mullick* (2). In the latter case it was held that under the 21st section, execution might issue after the expiration of three years from the time of the passing

(1) B. L. R., Sup. Vol, 492; S C., 6 W. R., Mis., 98.
(2) B. L. R., Sup. Vol., 709.

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of the Act to enforce a judgment which was in force at the time when the Act was passed provided some proceeding to enforce the judgment within the meaning of s. 20 had been taken within three years next preceding the application for execution. That decision was followed by the High Court of Madras in the case of *Karuppanan* v. *Muthannan Servey* (1).

The High Court of Bombay put a different construction upon s. 21. The cases are those of *Bai Udekwar* v. *Mulji Naran* (2) and *Makunda Valad Balacharya* v. *Sitaram* (3), referred to in the judgment now under appeal. They held that the words "nothing in the preceding section shall apply to judgments in force at the time of the passing of this Act" could not be rejected without violating a fundamental rule for the construction of statutes; and that the words "may be issued" should be read as "must be issued;" and the Chief Court treated the words "judgment in force at the time of the passing of this Act" as applicable to a judgment in force at the time of the extension of the Act to the Punjab, though not in force at the time of the passing of Act XIV of 1859.

It cannot be disputed that the construction put upon the Act by the High Court at Calcutta, if permissible, was equitable, and prevented what must be admitted to be an inconvenience and injustice. Indeed, if the construction put upon the Act by the High Court at Bombay, and by the Chief Court in the Punjab is correct, a judgment-creditor could not, after the three years, have enforced a judgment which was in force in the Regulation Provinces when Act XIV of 1859 was passed for a judgment which was in force in the Punjab at the time when the Act was extended to that province, however diligent, he might have been in endeavouring to enforce his judgment, and however unable, with the use of the utmost diligence, to get at the property of his debtor. Such a construction would cause great inconvenience and injustice, and give the Act an operation which would retrospectively deprive the creditor of a

(1) 5 Mad. H. C. Rep., 105. (2) 3 Bom H. C. Rep., A. C., 177.
(3) 5 Bom. H. C. Rep., A. C., 102.

right which he had under the law as it existed in the Regulation Provinces at the time of the passing of the Act, and in the Punjab at the time of the introduction of it. Their Lordships are of opinion that such a construction would be contrary to the intention of the Legislature.

There is no doubt that in some cases the word 'must,' or the word 'shall,' may be substituted for the word 'may,' but that can be done only for the purpose of giving effect to the intention of the Legislature; but in the absence of proof of such intention, the word 'may' must be taken to be used in its natural, therefore in a permissive, and not in an obligatory, sense.

On the construction of this inartificially drawn statute their Lordships are of opinion that the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act" mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and that the words "but process of execution may be issued" mean that, notwithstanding anything mentioned in the preceding section, execution might issue either within the time limited by law, or within three years next after the passing of the Act, whichever should first expire.

It appears, then, to their Lordships that the words "nothing in the preceding section" (as used in s. 21) mean that the prohibition laid down in s. 20 should not apply to judgments in force at the time of the passing of the Act.

Without expressing their concurrence in all the reasoning of the Full Bench in the Calcutta case above cited (1), their Lordships are of opinion that that decision was correct, and that the application made to the Court of the Deputy Commissioner of Delhi, on the 22nd of October 1869, being *bonâ fide*, though unsuccessful, was a proceeding to enforce the judgment within the meaning of s. 20; and that that proceeding having been taken within three years next preceding the application made on the 4th May 1871, to which the judgment

(1) *Kangaleechurn Ghosal* v *Bonomalee Mullick*, B. L. R., Sup. Vol., 709.

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now under appeal relates, such last-mentioned application was not barred by the 21st section of Act XIV of 1859, and ought to have been granted.

It was contended that the rule *res judicata* applied, and that the application made on the 4th of May 1871 was barred by the order of the Deputy Commissioner of the 10th day of December 1869, from which no appeal was preferred. But their Lordships are of opinion that the order of the 10th day of December 1869 was not an adjudication within the rule of *res judicata*, or within s. 2 of Act VIII of 1859.

For the above reasons their Lordships will humbly advise Her Majesty that the judgment and order of the Chief Court of the Punjab of the 31st of July 1874 be reversed, and that the judgment and order of the 17th of March 1873 be affirmed and stand in force; and that the defendant do pay to the plaintiffs their costs incurred in the Chief Court of the Punjab subsequently to that decree. The respondent must pay the costs of this appeal.

Appeal allowed.

Agents for the appellants: Messrs. *Johnston, Farquhar,* and *Leech.*

Agent for the respondents: Mr. *T. L. Wilson.*

IN THE INSOLVENT COURT.

Before Mr. Justice Kennedy.

IN RE MURRAY, AN INSOLVENT.

1877 *Aug.* 21 & 24.

EX PARTE DWARKANATH MITTER.

*Insolvency—Order and Disposition—Insolvent Act—*11 *and* 12 *Vict., c.* 21, *s.* 24*—Goods pledged by Insolvent and re-delivered to him on Commission Sale.*

M., who carried on the business of a watch and clock-maker in Calcutta, borrowed from *D. M.* Rs. 6,000, for which he gave a promissory note, and, as collateral security for the payment of which sum, he pledged certain articles consisting of watches, clocks, &c., with *D. M.* The articles remained

for some months in the custody of *D. M.*, who then re-delivered them to *M.* for sale on commission, the proceeds to be applied in liquidation of the debt. *M.* gave a receipt for the articles, and some of them were sold by *M.* on those terms. On the 2nd of May 1877, *M.* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *D. M.* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession. *Held*, the articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods. *D. M.'s* interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *D. M.* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail dealer and leaving them with him for commission sale. *Semble.*—No such arrangement would be upheld as against the Official Assignee.

THIS was an application for an order that the Official Assignee should make over to the claimant, Dwarkanath Mitter, certain articles which had come into his possession as assignee of the estate of the insolvent.

The affidavit of Dwarkanath Mitter in support of the application stated that, on the 7th of December 1874, the insolvent, who carried on the business of a watch-maker and jeweller in Calcutta, borrowed from him Rs. 6,000, for which he gave a promissory note payable three months after date; and, as collateral security for the payment of which sum, he pledged certain articles consisting of clocks, chronometers, &c., with Dwarkanath Mitter; and those articles remained in his custody for three or four months; that Dwarkanath Mitter, subsequently, at the insolvent's request, sent the said articles to the insolvent on commission sale, and obtained a receipt for them; that the insolvent was, according to the custom of the European jewellers in Calcutta, in the habit of receiving articles on commission sale, and some of them were so sold by the insolvent; that, on the 2nd of May 1877, the insolvent filed

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his petition in the Insolvent Court, and the Official Assignee, among other things, took possession of the articles remaining unsold, and as he declined to make them over to the claimant without an order of Court, this application was made for an order directing their return.

Mr. *J. G. Apcar* for the claimant, as to the jurisdiction of the Court to entertain such an application as this, and that it was not necessary to bring a regular suit, referred to *Llewellyn* v. *O'Dowda* (1). He then contended that the result of the transaction between the claimant and the insolvent was not to effect such a transfer to the latter as would subject the goods to his order and disposition on his becoming insolvent. It was customary to leave articles with tradesmen, as for instance watch and clock-makers, and carriage-makers; but the fact of their being so left did not have the effect of inducing persons to give greater credit to such tradesmen, and such articles were not liable, on the insolvency of the trader, to pass to the Official Assignee as being in the order and disposition of the insolvent. It is a well-known custom in Calcutta for jewellers to take goods as agents and sell them on commission sale. In such a case the goods would not be in the order and disposition of the insolvent; see *Priestly* v. *Pratt* (2). The insolvent was only an agent for sale, and there was no consent that he was to be the reputed owner; see *Smith* v. *Hudson* (3); *Load* v. *Green* (4); Griffiths on Bankruptcy, ed. of 1867, p. 463; Dindley on Partnership, 3rd ed., 1193, *Ex parte Brown* (5); *Ex parte Gledstanes* (6). See also the class of cases referred to in Lindley on Partnership, 1158, where goods are entrusted for a particular purpose to a person who subsequently becomes insolvent; *Ex parte Waring* (7); *Ex parte Frere* (8).

Mr. *Piffard* for the Official Assignee submitted that there was nothing to show that the goods passed actually into the possession of the claimant. [Mr. *Apcar*.—That was I thought

(1) Taylor's Rep., 169.

(2) L. R., 2 Exch., 101.

(3) 34 L. J., Q. B., 145; *per* Blackburn, J., p. 151.

(4) 15 M. & W., 216.

(5) 3 Mon. and Ayr., 471, at p. 476.

(6) 3 Mon. Dea. and De Gex, 109.

(7) 19 Ves., 345.

(8) Mon. & McAr., 263.

admitted.] The desire and intention of the parties was that the goods should be sold as those of the insolvent. They were in the order and disposition of the insolvent, and are rightly in the hands of the Official Assignee.

Cur. adv. vult.

KENNEDY, J.—In this case I have no difficulty in determining that the Official Assignee ought not to make over the goods to the applicant, and to direct that he should defend any suit that may be brought against him. I am not so sure that the strongest ground of the assignee's claim is the reputed ownership clause, because, so far as I can judge, on the facts, the insolvent was not only the reputed but the real owner. The allegation is that the goods were pledged to the applicant, who re-delivered them upon certain terms,—that is to say, that the insolvent should sell them; and, as I understood Mr. Apcar to say, should apply the proceeds in liquidation of his debt. Now, as I take it, at common law, the interest of the pledgee of goods ceased by his ceasing to have possession of them at least by his own consent, and the Contract Act does not seem to me to change this. It describes pledge as a bailment, and the natural inference is, that when the bailment comes to an end, the pledge does so likewise. We have then the goods in the hands of the insolvent discharged of the applicant's lien and subject only to the terms of the receipt, which, at the outside, only amounts to an agreement to sell the goods and apply the proceeds in liquidation of his debt; for breach of this the applicant could prove and recover a dividend.

Even if, however, the applicant were in a position to put his claim higher, and to rely on his having an interest in the goods, I do not think he can escape the operation of the order and disposition clause. As Mr. Piffard pointed out, there is not anything to show in what way the applicant took possession of the goods; nothing to point out that publicity and notoriety of change of possession or of ownership which in *Lingard* v. *Messiter* (1) was held so important. It is true that a well-estab-

(1) 1 B. & C., 408.

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lished course of trade as in *Ex parte Watkins* (1) will prevent the mere possession of goods inferring such reputation of ownership as to bring the goods within the statute, otherwise some most useful branches of commerce would become impossible, as for instance commission agency, leasing chattels, and possibly even pawnbroking. But the usage must be well established, *Ex parte Lovering* (2), and above all the transaction must be clearly *bonâ fide.*

Now, without going into the question suggested in *Ex parte Watkins* (3), which points out the difference of position of goods in a retail shop, I may say that no amount of evidence would convince me that there was a practice or custom of purchasing goods from a retail dealer and leaving them with him for commission sale; and I may further say, that I do not think that any arrangement by which in substance and effect one creditor secures a preference as to the proceeds of certain goods over the others by an arrangement which leaves the goods in the manual power of the bankrupt, can ever be upheld. The most formally drawn conveyance, by which the goods were assigned to the creditor with a provision that they were to be returned to the debtor's shop, and then sold by him and the proceeds applied in liquidation of his debt would fail. Why should this transaction be supported which only differs from that by the real meaning and intention not being clearly and explicitly stated—a difference which does not tend in its favour.

Any other doctrine would, in truth, sweep away the whole principle of the order and disposition clause. I have not been referred to any one single case in which the property in dispute was a personal chattel in the manual possession of the bankrupt, and the claimant claimed it as a mortgagee, where such claim was allowed. The cases of *Spackman* v. *Miller* (4) and *Hornsby* v. *Miller* (5) are intended as complementary to each other. The one shows the result of an arrangement operating as a re-demise of mortgaged goods, and thus preventing the pos-

(1) L. R., 8 Ch., 520.

(2) L. R., 9 Ch., 624.

(3) L. R., 8 Ch., 520, at p. 531.

(4) 12 C. B., N. S., 659 S. C., 9 Jur., N. S., 50.

(5) 1 E. & E., 192; S. C., 5 Jur., N. S., 938.

session during the time being with the consent of the true owner, and the other, when the possession is consistent with the mortgage deed. I believe it to be impossible and against the spirit of the Act by any conveyancing device to give a lien for money advanced upon goods previously the property of the bankrupt, and returned to or permitted to remain with him. The power of so borrowing money would be much more dangerous than that of raising money by sales at an undervalue equivalent to the amount which would be advanced on pledge. Such sales would, in many cases, be strong evidence of criminal intention in the original purchaser of the goods, or at any rate would lead to speedy discovery.

Application refused.

Attorney for Dwarkanath Mitter: Baboo *P. C. Mookerjee.*

Attorney for the Official Assignee: Messrs. *Orr* and *Harris.*

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, Mr. Justice Pontifex, and Mr. Justice Ainslie.

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IN THE MATTER OF THE PETITION OF BURAH AND BOOK SINGH.

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Jurisdiction of High Court—Act VI of 1835—*Act XXII of* 1869, *s.* 9—24 *&* 25 *Vict., c.* 67, *s.* 22; *c.* 104, *ss.* 9, 11 *and* 13—3 *&* 4 *Will. IV, c.* 85—16 *&* 17 *Vict., c.* 95—17 *&* 18 *Vict., c.* 77—*Delegation, Power of.*

By Act XXII of 1869 certain districts were removed from the jurisdiction of the High Court, and by s 5 the administration of Civil and Criminal Justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s. 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October 1871, the Lieutenant-Governor extended the provisions of the Act to the Cossyah and Jynteeah Hills, and directed that the Commissioner of Assam should

* Criminal Appeal, No. 482 of 1876, against an order of Col. Bivar, Deputy Commissioner of Shillong, dated the 24th of April 1876.

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exercise the powers of the High Court in the Civil and Criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April 1876, and were on conviction sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court *held*, by the majority of a Full Bench (GARTH, C.J., MACPHERSON and PONTIFEX, JJ., dissenting), that the High Court had jurisdiction to entertain the appeal, and such jurisdiction was not taken away by Act XXII of 1869.

Per Curiam.—The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court.

Per JACKSON, AINSLIE, and MARKBY, JJ. (KEMP., J., concurring).—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in Act XXII of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanction by the tacit recognition of Parliament: Act XXII of 1869 is therefore so far invalid.

Per MACPHERSON, J. (PONTIFEX, J., concurring)—Such delegation is nowhere expressly prohibited, and does not bring the Act under any of the restrictive provisions of the Indian Council's Act.

Per GARTH, C.J., and MACPHERSON, J. (PONTIFEX, J., concurring).—The power of delegation now questioned had been exercised in many cases for a series of years previous to the passing of the Indian Council's Act, and that Act (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal.

Per GARTH, C.J., JACKSON, MARKBY, and AINSLIE, JJ., (KEMP, J., concurring).—The High Court has power to question the validity of the legislative acts of the Governor-General in Council.

Per MACPHERSON, J. (PONTIFEX, J., concurring).—The High Court has no such power if satisfied that the act is not within any of the prohibitions of the Indian Council's Act.

Two prisoners, Burah and Book Singh, were convicted of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills, and were sentenced to death. On the 23rd of April 1876, the sentence was commuted to transportation for life by the Chief Commissioner of Assam. On the 9th of July 1876, the officer in charge of the Kamrup jail forwarded to the High Court a petition of appeal from the prisoners. The appeal came on for hearing before Markby and Ainslie, JJ., who referred to a Full Bench the question whether the High Court had any power to entertain these applications.

On the 12th of September 1874, the reference came on for hearing, and was argued by the *Legal Remembrancer* (Mr. *H. Bell*) on behalf of the Bengal Government, before Sir R. Garth, C.J., Kemp, Macpherson, Markby and Ainslie, JJ.

On the 2nd of February, at the instance of the Government of India and before the judgment was delivered, the point was re-argued.

The *Advocate-General, offg.* (Mr. Paul), the *Standing Counsel* (Mr. *Kennedy*), and the *Legal Remembrancer* (Mr. *H. Bell*) for the Crown.

Mr. *Phillips* for the prisoners.

The *Advocate-General.*—The validity of s. 9, Act XXII of 1869, is first questioned. There is a further question as to whether the Governor-General in Council can affect the jurisdiction of the High Court. The latter point is concluded by *Queen* v. *Meares* (1). [GARTH, C.J.—Confine yourself to the invalidity of s. 9. Mr. *Phillips*—*Queen* v. *Meares* (1) does not cover the point raised here. That case only decides as to the power to subject British subjects to another court. MARKBY, J.—It does not go so far as to say that the Governor-General in Council may entirely abolish the jurisdiction of the High Court.] 3 & 4 Will. IV, c. 85, s. 43, gives full power to legislate concerning anything except certain matters specified; s. 51 enacts that nothing in the Act shall affect the right of Parliament to legislate for India, and expressly reserves to Parliament control over the acts and proceedings of the Governor-General in Council, and the better to enable that body to exercise the powers reserved requires that all laws and regulations made by the Governor-General in Council shall be laid before Parliament. There, therefore, exists a complete check over improper legislation. The administrative power to establish Courts has existed unquestioned with the exception of a dictum thrown out by Sir L. Peel in the case of *Biddle* v. *Tarney Churn Banerjee* (2), the broad proposition of which is open to question. Many Acts have been passed which it is provided should come into operation on the notification of some person to whom discretion is given to bring

(1) 14 B. L. R., 106. (2) 1 Tay. Bell, 391; see p. 404

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the Acts into force. [MACPHERSON, J. — That is a different point.] If it be admitted that the Governor-General in Council has power to depute authority to the Lieutenant-Governor to declare when certain Acts shall come into force, then the High Court has no jurisdiction to entertain this appeal. The Governor-General in Council can say that an Act shall come into force on the happening of a certain contingency, say the death of a person. [JACKSON, J.—Suppose it be when the province shall have arrived at a certain stage of civilization? Then the word of the Lieutenant-Governor can be taken. If there be no objection to the principle that an Act shall come into force on a date to be named by the Lieutenant-Governor, then s. 9 would have validity with reference to s. 4. By Act VIII of 1859, the Local Government had power assigned to it to extend the provisions of that Act to any place. The intention of the Government is, that laws and regulations applicable in certain places, being inapplicable in other districts, shall not there have any force until those districts are prepared to receive them. This has actually been done with respect to the Garo Hills. [GARTH, C.J.—I do not agree with you. The Governor-General in Council had not come to any conclusion as to the Jynteeah Hills, and had delegated his authority to the Lieutenant-Governor to come to a decision.] The argument now is as to the intention of the Legislature. The Governor-General in Council has the power to say that an Act shall come into operation when the Local Government shall direct, see Act VIII of 1859, ss. 387, 388. The High Court has not the power to try whether or not that power has been rightly exercised; see Sedgwick on Statutory and Constitutional Law, p. 137. The American books refer to the Legislature with far more limited power than that of the Indian Legislature. In the Bhownuggur case *Damodar Gordhan* v. *Deoram Kanji* (1) their Lordships of the Privy Council would not allow the political matters (the policy of a measure) to be argued. The High Court has no concern with political questions. The question whether or not a Court has been rightly

(1) I. L. R., 1 Bom., 367; S. C., L.R., 3 I. A., 102.

reconstructed cannot arise before the High Court. The jurisdiction having been once taken away ceases to exist. By 16 & 17 Vict., c. 95, ss. 19 and 29, and 24 & 25 Vict., c. 67, s. 22, two things are provided,—*viz.*, the power to legislate and that the laws should be made in Council. [GARTH, C.J.—If the power given is to make laws in Council only, where would be the use of that restriction if the Governor-General is at liberty to say that any one in Bengal may have the same power?] The Governor-General in Council could do so. But the question does not arise, as it is not to any one to whom he delegates the authority. Although there is no restriction placed on the subject of legislation, there is no restriction as to the mode of making the legislation operative. If Parliament considers it convenient to delegate authority to administrative officers to carry out measures, why may not the Governor-General in Council do so? There is the same authority with respect to unexcepted subjects as there is in Parliament. [GARTH, C.J. —His power being derivative, the Governor-General in Council has not as much power as Parliament.] Discretion is given to the Lord Lieutenant of Ireland. Is it a bad law to say that a person of competent capacity shall decide a certain point? Is it a bad law to appoint a law officer of the Crown an arbitrator, when there are Common Law Courts and the House of Lords to which the suitor could go? [MARKBY, J.—Power deputed to the Lord Lieutenant might be said to be unconstitutional delegation, but no Court of law could question it. The more precise question would arise, whether the delegation was *ultra vires?* The difference is that which exists between a sovereign Legislature and a derivative Legislature.] The question might be as to the subject, not as to the mode of legislation. [GARTH, C.J.—But can the powers given to the Governor-General in Council alone be transferred?] The powers are not transferred; all that there is done is that provision is made how those powers can be brought into force. [GARTH, C.J.—If the Lieutenant-Governor were not to notify any date, there would be no law, criminal or civil.] The word 'may' here does not leave option to the Lieutenant-Governor. By the wording, the Lieutenant-Governor is bound

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to extend the Act, but within an unspecified time. Having provided law on a certain subject, the Act gave power to the Lieutenant-Governor to say when it was to come into force. There is no limitation as to ministerial duties. The time when a tax shall be imposed is not defined in an Act, nor the mode of operation, nor what kind of a horse, or what kind of a cart, shall be taxed. So long as Governor-General in Council keeps within the subjects concerning which he is allowed to legislate, there can be a valid delegation of authority. A sub-agent can bind the principal; Story on Agency, 14, *Rossiter* v. *Trafalgar Life Assurance Association* (1), *Quebec and Richmond Railway Company* v. *Quinn* (2). Matters wrongly decided and illogically stated will be maintained if the contrary would disturb a settled state of affairs—*Dumpor's case* (3).

There are a number of Acts passed since 1848 under which there has been a delegation of authority. Among them are the following: Acts XXII of 1855; XIII of 1859; XXV of 1861; VI, XIV, and XIX of 1863; XXII of 1864, XIV of 1865; XX of 1866; XXIII of 1867. See Maxwell on Statutes, p. 166.

The Standing Counsel.—Act XIV of 1874 repeals Act XXII of 1869. [MACPHERSON, J.—That Act is of no effect, see s. 3. Mr. *Phillips.*—If the Act is repealed, there is no further necessity to argue.] 24 & 25 Vict., c. 67 (the Indian Councils' Act), conferred powers on the entirely new Legislatures of Madras and Bombay. When this Act was passed, former restrictions were got rid of. 16 & 17 Vict., c. 95, then in force, conferred on the legislature, after making provision for the appointment of certain Additional Members, powers of making laws and regulations. 24 & 25 Vict., c. 67, shows a desire to extend the powers of the Legislature. That which it can, and that which it cannot do, are strictly defined. The fact that powers given are expressly limited shows that they would otherwise be unlimited. When Parliament passed this Act, a long series of Acts passed by the Governor-General was in existence. The long list

(1) 27 Beav., 377. (2) 12 Moore's P. C., 232.

(3) 1 Smith's L. C., 41., 7th ed.

of enactments bears very strongly on the construction of this Act. Parliament did not appear to take away the power which had been, rightly or wrongly, Professedly exercised. The presumption is that Parliament was cognizant of all concerning which it legislated. The is then ,that which amounts to legislative sanction. The Governor-General in Council may not have power to give away legislative powers, but it has power to make a law. The law is to make the Lieutenant-Governor do a certain act. He is by statute an executive officer, and can be compelled so to act. [GARTH, C.J.—Then what becomes of the discretion of the Lieutenant-Governor?] If there is an outbreak, say on the Punjab frontier, the Governor-General has power to suspend all laws and leave districts at the will of a General. True that would be in a case of emergency, but can a Court of law examine into motive? Unless a construction can bear the strain both ways, it is not the true one. Parliament, in the regular course of its legislation, confers the duty on others to make bye-laws, or to fix a time at which a particular Act shall come into force. Parliament has never passed a single word of censure on the Indian Legislature for having adopted the same practice. By 32 & 33 Vict., c. 115, the Home Secretary in England was entrusted with the power to license hackney carriages, and to fix a scale of fares, a power which it has been decided was validly conferred: *Bocking* v. *Jones* (1). The Legislature is not to contemplate the remote contingency that power may be conferred on an incapable person, but must assume that public officers will do their duty. Take a municipality as an illustration: there are certain acts which would be accounted offences if committed within the boundaries, but not so if without the boundaries. If a general municipal law were passed, and if was provided it should only apply to certain places mentioned in a schedule to that Act, could not a provision be made that the Act be afterwards extended to other places as they became ready for it? Acts of this kind were passed during the mutiny while Sir B. Peacock was Legal Member of Council: see Acts VIII of 1857 and XIV of 1857. [JACKSON, J.—The mutiny was an emergency.] No

(1) L. R., 6 C. P., 29, at p. 35.

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Act is passed unless there is a necessity for it, and these were passed very shortly before the passing of the Indian Councils' Act; see Acts XXVIII of 1857; VI and XX of 1858; XX of 1859; 19 & 20 Vict., c 36. The Peace Preservation (Ireland) Act contained certain sections of 11 & 12 Vict., c. 2, giving power to the Lord Lieutenant to proclaim certain districts. The Act continued in force until 1870, when another Act was passed. The matter was frequently agitated, and the points well known to the Legislature. If there is injustice done under an Act of the Legislature, indemnity might be afforded. Necessity or emergency for a measure cannot come into question. It is a question of state to be determined by the Legislative Council alone. If the High Court can question the policy of an Act of the Legislature, then it can be questioned by any Munsif's Court.

The High Court sits under a power conferred on Her Majesty by Parliament to establish it; there is a delegation of power when Courts of any description change or modify the practice of pleading. Under what authority are the rules issued? There is no authority contained in the Charter authorizing Judges to issue rules. [GARTH, C.J.—There must be power given to Judges to make rules to carry on work and for new Courts.] But a new Court must follow the common law in its procedure. In Equity Courts in England it is considered necessary to give statutory power. [GARTH, C.J.—The old system of pleading had become the law of the land.] The practice of this Court as of the Queen's Bench is a law of the Court. When the Legislature has once commanded, the question of emergency cannot be questioned: *Phillips* v. *Eyre* (1). When war is imminent, the Government is charged by the very necessities of the case to take measures. The executive is charged with extended powers. No responsibility is taken away if a minister act in a manner which, under ordinary circumstances, would be illegal; he at once becomes responsible to the tribunal of the country. The authority given to the Lieutenant-Governor was not delegated authority, but

(1) L. R., 4 Q. B. 225; S. C. on appeal, 6 *id.*, 1.

derivatives. By Act XXXVII of 1855, "the Sonthal Pergunnahs Act," the jurisdiction of the Sudder Court was taken away. The following case and Acts were also quoted: *Leverson* v. *Queen* (1); and Acts XIV, XXII, and XXIII of 1836; XVI and XXVI of 1837, as to the course of practice.

Mr. *Phillips* for the prisoners.—The questions to be argued are: (1) Has the power been validly deputed to the Lieutenant-Governor, *i. e.*, is the Lieutenant-Governor validly authorized? (2) Has the Governor-General in Council the power which he here delegates? Unless the Lieutenant-Governor has been authorized by the Imperial Legislature, he has not been validly authorized. Parliament has shown, by giving express powers, not only that the power of the Governor-General in Council is strictly limited by the Acts, but that the power of delegation claimed had not been given; see 24 & 25 Vict., c. 67; s. 6 (3 & 4 Will. IV, c. 85, s. 70) 8, 17, 18, 23; 24 & 25 Vict., c. 104, s. 18; 28 Vict., c. 15, s. 5. Parliament has not created a Legislature like itself; it has only given certain persons a certain limited power of making laws. Even a Colonial Legislature like itself has not all its powers as incident, and in fact has only the powers conferred: *Doyle* v. *Falconer* (2); *Fenton* v. *Hampton* (3). [GARTH, C. J.—The cases decide that inherent privileges were not vested, but assume supreme legislative power.] True, but of a limited kind. It is not contended that within limits it has not supreme power. It lies on the Crown to show what power is vested in the legislative assembly. The contention on the part of the Crown is, that since the English Parliament delegates authority, the Governor-General in Council has the same power; then the Lieutenant-Governor also will have power to delegate the authority given to him to another. S. 6, Indian Councils' Act, gives certain powers; it shows that the Council had not those powers, and that a section giving them was thought to be necessary, and this expressly excepts the making of laws and regulations. The power in a Legislature with affirmative powers is not beyond

(1) L. R., 4 Q. B., 394. (2) L. R., 1 P. C., 328.

(3) 11 Moore's P. C., 347.

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that which is expressly given; as an incident, the power to the Lieutenant-Governor to extend an Act is not included. A power derived from the Imperial Parliament is limited by the Act giving power. Therefore, unless some authority be shown, the Legislative Council has not the power claimed by it. The Lieutenant Gevernor has not the power to call a dead Act into life. Lieutenant-Governor is deputed to exercise legislative discretion to the extent of seeing whether or not this law, or which portion of it, should be applied. The wisdom or propriety of a measure is not questioned, but the authority of the Governor-General in Council: The English Parliament itself was not at one time supreme: Sedgwick on Statutory and Constitutional Law, p. 123. It is the Governor-General in Council who has authority to make laws and regulations, but here it is not the Governor-General in Council who has been legislating It is the Lieutenant-Governor who has exercised legislative functons. Ministerial functions can be distinguished from legislative functions, which consist in the legislative consideration of what is necessary. The Governor-General in Council has deprived himself of this power, and has conferred it on the Lieutenant-Governor. Jurisdiction existed in the Supreme Court which was transferred to the High Court. Then by an order of the Lieutenant-Governor the whole jurisdiction of this Court may be withdrawn, leaving the learned Judges drawing their salaries, but as nonentities. There are consequences as serious in holding this to be a valid Act as there may be in holding it to be invalid. [PONTIFEX, J.—Jurisdiction was given by the High Court Charter; the Governor-General could not take away that jurisdiction.] The greater his power, the more necessary to secure the exercise of it by himself. The High Court, which was created by the same power, and which may determine whether he has validly abolished all law, cannot be abolished by him. Absence of express condemnation cannot be construed as sanction by Parliament of an illegal cause. The Parliament is presumed to have before it only their own statutes in *pari materia*—Maxwell on Statutes, pp. 27 and 28; but not all the Indian Acts which show an excess of power. No case goes as far as is required. As to

Leverson v. *Queen* (1) see the report, p. 404. This would give greater force to the user than to a preamble: *Market Harboro Trustees* v. *The Kettering Highway Board* (2), *Wilson* v. *Knubley* (3). This Act, XXII of 1869, cannot be upheld at all, unless the whole is valid. The Civil Procedure Code was hastened as to its operation with respect to provisions which were to have come into force The general municipal enactment would merely bring more persons into the community, the law existing all the while.

The *Standing Counsel* in reply.—The Governor-General in Council can take away the jurisdiction of the High Court, and can create a jurisdiction identical to that taken away. [MARKBY, J.—Then the High Court of Madras might have conferred on it jurisdiction over the Jynteeah and Cossyah Hills.] It is prohibited by the provisions of an Act which it cannot touch by express provision; see 24 & 25 Vict., c. 67, s. 23. [GARTH, C. J.—Some members of the Legislature might think it necessary to constitute new Courts more subordinate to the Legislature than they are new.] No great or high power can be conferred without opportunity of abuse, but the check would be rapid enough to stop injury. If the Legislature of a colony being a supreme Legislature thought fit to pass a law enabling to commit for contempt, it could do so. [Mr. *Evans* as *amicus curiæ* referred to *Rutter* v. *Chapman* (4), and Grant on Corporations, p. 80.]

Cur. adv. vult.

The following judgments were delivered by the Full Bench :—

MARKBY, J.—Two persons, Burah and Book Singh, have been convicted on a charge of murder by the Deputy Commissioner of the Cossyah and Jynteeah Hills and sentenced to death. The sentence was commuted to transportation for life by the Chief Commissioner of Assam on the 23rd April 1876.

On the 9th July 1876, the officer in charge of the Kamrup jail forwarded to this Court petitions of appeal from these prisoners, unaccompanied by copies of the judgment.

(1) L. R., 4 Q. B., 394.
(2) L. R., 8 Q. B., 308.
(3) 7 East, 135.
(4) 8 M. & W., 1.

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The first question which arises in the case is, whether the High Court has any power to entertain these applications; and this question is one of so much importance that it has been referred to a Full Bench, and has been on two occasions very fully argued.

The Cossyah and Jynteeah Hills comprise a considerable tract of country on the eastern frontier of Bengal, and they contain a population which, in 1862, was estimated at 120,000. The Jynteeah Hills were formerly under the independent Rajah of Jynteeah. The Cossyah Hills were divided into a number of smaller districts under different rulers. Of the twenty-five Cossyah states, five used commonly to be called "semi-independent," and the remaining twenty "dependent." It is not very clear how this division was arrived at, and it probably has never been accurately ascertained what part of the Cossyah Hills is, and what is not, British territory. But by far the greater portion has long been subject to our Government, and is therefore (21 & 22 Vict., c. 106, s. 1) included in British India.

Prior to 1854 there was a Political Agent of the Cossyah Hills, who exercised the usual powers of a Political Agent with regard to so much of the territory as was under chiefs who were treated as independent; but he also held general powers for the administration of justice in those portions of the territory which had ceased to be independent. Probably, in practice, the difference was of no very great importance, the chiefs being all too insignificant to assert any independent authority. This officer was in command of the Sylhet Light Infantry and he acted also as the Political Agent in respect of Jynteeah, which, up to the period of the Burmese War in 1824, was independent. During that war the Jynteeah territory was taken, under the protection of the British, and the Rajah acknowledged his allegiance. In 1835 the reigning Rajah was deposed for an act of cruelty and his territory was annexed. From the date of this annexation the Political Agent of the Cossyah Hills seems to have exercised the same functions with regard to Jynteeah, as he had hitherto exercised in respect of the annexed portions of the Cossyah Hills. But he still continued

to bear the somewhat inappropriate designation of Political Agent of the Cossyah Hills.

In the year 1835 an Act was passed (Act VI of 1835), by which the functionaries in political charge of the "Cossyah Hills" were placed under the control and superintendence, in criminal matters, of the Court of Nizamut Adawlut. From the records of this Court it appears that, on the 16th June 1835, the Court informed the Government of Bengal that the Political Agent of the Cossyah Hills had submitted returns of criminal business for Jynteeah also. The Government replied that the Jynteeah territory was taken possession of on the 15th of March, whilst the Act was passed on the 13th, and that if the Court thought that this did not constitute any objection to their doing so the Government saw no objection to the Court exercising jurisdiction in Jynteeah, which was accordingly authorized. The Court replied accepting the jurisdiction in Jynteeah from the date of the Act. The arrangement of the duties of the Political Agent of the Cossyah Hills remained as above stated until 1854, when an order was issued by the Governor of Bengal (1st March 1854) to the Commissioner of Assam, communicating his determination to separate the Civil functions of the Political Agent in the Cossyah Hills from the command of the Sylhet Light Infantry, and to vest the former in an Assistant Commissioner, subordinate to the Commissioner of Assam, "precisely on the same footing as the other principal assistants in the Province of Assam." The order also intimates that the officer to be appointed would be called "Principal Assistant in charge of the Cossyah and Jynteeah Hills." From that time the Cossyah and Jynteeah Hills, though never formerly annexed to the district of Assam, seem to have been treated as part of Assam. All the criminal appeals which in Regulation Provinces would go to the Sessions Judge, went to the Deputy Commissioner of Assam, and were apparently disposed of by him in the same manner as any other criminal appeals in Assam.

In the year 1861, the jurisdiction which had been exercised by the Nizamut Adawlut was transferred to the High Court upon its creation by Her Majesty's Letters Patent. The Code

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of Criminal Procedure was extended to Assam by a notification of the Lieutenant-Governor of Bengal published in the *Gazette* of 16th November 1862, and though never expressly extended (as far as I have discovered) to the Cossyah and Jynteeah Hills, it was considered to be in force in that district without any further notification; and this it would be, if the view that this district was made a part of Assam were correct.

In the year 1866, the Assistant Commissioner convicted a prisoner, named U Don Dolloi, of an offence under s 504 of the Indian Penal Code, and bound him over to keep the peace for one year after his release. On appeal to the Deputy Commissioner of the Cossyah and Jynteeah Hills, that officer confirmed the order; but this Court, upon a petition presented by the accused, altered the period for which the party was bound over.

In the year 1869, the Deputy Commissioner of the Cossyah and Jynteeah Hills referred a sentence of death for confirmation by this Court under s. 380 of the Code of Criminal Procedure. The sentence was confirmed, and the prisoner was hanged.

Under these circumstances, there can be no doubt that this Court had at one time jurisdiction in the Cossyah and Jynteeah Hills. The only question therefore is whether this jurisdiction has been taken away, and this renders it necessary to consider the recent legislation with regard to these districts.

By s. 4 of Act XXII of 1869 (which is called the "Garo Hills Act") the Garo Hills are removed "from the jurisdiction of the Courts of civil and criminal judicature, and from the control of the officers of revenue constituted by the Regulations of the Bengal Code, and the Acts passed by the Legislature now or heretofore established in British India, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid;" and it is provided that "no Act hereafter passed by the Council of the Governor-General for making Laws and Regulations shall be deemed to extend to any part of the said territory unless the same be specially named therein." By s. 5 "the administration of civil and criminal justice and the superintendence of the settlement and realization of the public revenue and of all matters

relating to rent within the said territory, are vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint;" and the officers so appointed are, in the administration of justice, to "be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue."

By s. 9 the Lieutenant-Governor is empowered to extend all or any of the provisions of this Act to the Cossyah and Jynteeah Hills.

By a notification in the *Calcutta Gazette* of 14th October 1871, the Lieutenant-Governor did extend the provisions of this Act to the Cossyah and Jynteeah Hills; and he also directed that the Commissioner of Assam should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of that district. On the 30th July 1872, rules were issued by the Lieutenant-Governor, under ss. 5 and 9 of Act XXII of 1869, for the administration of justice and police in the Cossyah and Jynteeah Hills, in which no allusion is made to the High Court.

Shortly after this, another power, which had been conferred by Parliament upon the Governor-General in Council, was called into action with reference to these districts. By proclamation of tha 6th February 1874 (see *Gazette of India* of 7th February), in exercise of the powers conferred by s. 3 of Statute 17 & 18 Vict., c. 77, the Governor-General in Council took some districts (now forming 'Assam' and including the Cossyah and Jynteeah Hills) under his immediate authority and management, which districts were till then under the Lieutenant-Governor of Bengal. On the same day, by another proclamation, the Governor-General in Council constituted Assam a Chief Commissionership.

By Act VIII of 1874, after a recital that the Cossyah and Jynteeah Hills had been taken under the direct management of the Governor-General in Council, and had been made part of the Chief Commissionership of Assam, all the powers then vested in the Lieutenant-Governor of Bengal were (s. 1) transferred to the Governer-General in Council, and the

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Governor-General in Council was empowered (s. 2) to delegate to the Chief Commissioner all or any of the said powers, or to withdraw the said powers.

By Act XIV of 1874, in which the Cossyah and Jynteeah Hills are specially named, Act XXII of 1869 is repealed, and the Local Government is empowered (s 6) to appoint officers to administer criminal and civil justice and to regulate the procedure of officers so appointed, but not so as to restrict the operation of any enactment for the time being in force in any of the said districts. And it is also declared (s. 7) that all rules theretofore prescribed for the guidance of officers "for all or any of the purposes mentioned in s. 6 and in force at the time of the passing of this Act shall continue to be in force unless and until otherwise directed." This Act, however, has not yet come into force in those hills, because as yet no notification under s. 3 has been published.

By notification of the 16th April 1874 (see *Gazette of India*, April 18th), the Governor-General in Council, under s. 5 of Act XXII of 1869, made certain alterations in the rules for the Cossyah and Jynteeah Hills published under the notification of July 30th, 1872, by the Lieutenant-Governor of Bengal, and republished the rules. In these rules no mention is made of the High Court.

It thus appears that the jurisdiction of the High Court was certainly in existence until the passing of Act XXII of 1869. The question then is, has this jurisdiction ceased by reason of that Act, or by reason of anything done by any person under that Act? For the prisoners it is contended (1) that the jurisdiction of the High Court as established by Parliament cannot be wholly abolished by any authority in this country whatsoever; (2) that if there be any authority which can abolish the jurisdiction of the High Court, it is only the Governor-General in Council exercising legislative powers at a meeting for the purpose of making laws and regulations who can do this; and that in this case the assumed abolition was not by this authority, but by the Lieutenant-Governor of Bengal acting under the powers given to him by Act XXII

of 1869, which powers, it is contended, were not validly conferred.

With regard to the first question, the jurisdiction of this Court in the Cossyah and Jynteeah Hills was a jurisdiction vested in the Nizamut Adawlut at the time of its abolition, and it thus falls within the 2nd clause of s. 9 of the 24 & 25 Vict., c. 104. It is, therefore, in my opinion, expressly made subject by that clause to the legislative powers of the Governor-General of India in Council, or (to use a phrase which is more convenient) to the Legislative Council of India.

I have given fully my reasons for this construction of the High Courts' Act in *In the matter of the Petition of Syed Feda Hóssein* (1), to which reasons I still adhere, and in which I understand the other members of the Full Bench substantially concur.

It is necessary, therefore, to consider the second objection taken on behalf of the prisoner. This objection is met by the Crown in three different ways:—First, it is said, that the Act of 1869 does itself actually take away the jurisdiction of this Court. Secondly, that even if it does not do so, it evinces a final determination of the legislative authority that this jurisdiction shall be taken away, and that it only leaves it to the Lieutenant-Governor to fix the exact date of the Act coming into operation; no discretion being vested in him as to whether the Act shall come into operation or not. Thirdly, that even if the Lieutenant-Governor be vested with a discretion to determine whether or no the jurisdiction of this Court shall be taken away, still there is nothing which renders such a delegation of authority illegal.

The first and second of the three propositions put forward on the part of the Crown depend upon what is the true construction of Act XXII of 1869. The Act is a very peculiar one. It recites that "it is expedient to remove the Garo Hills from the jurisdiction of the Civil, Criminal, and Revenue Courts and offices established under the general Regulations and Acts, and to provide for the administration

(1) I. L. R., 1 Calc., 431.

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of justice and the collection of revenue in the said territory." The Act is to be called "The Garo Hills Act, 1869," and it is to come into operation "on such day as the Lieutenant-Governor of Bengal shall by notification in the *Calcutta Gazette* direct." Then by s. 3, "on and after such day," that is to say, when the Act comes into operation in the Garo Hills, Act VI of 1835, so far as it relates to the Cossyah Hills, is to be repealed. Then ss. 4 to 8 deal exclusively with the Garo Hills and s. 9 gives the power already adverted to to extend all or any of the provisions of the Act to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British India. It is contended that s. 3, which relates to the repeal of Act VI of 1835, came into operation, so far as regards the Cossyah Hills, when the Lieutenant-Governor brought the Act into operation in the Garo Hills; that there was no discretion left as to bringing the Act into operation in the Garo Hills, and that by the repeal of Act VI of 1835 the jurisdiction of this Court, as created by that Act, was destroyed. Assuming, for the present, the correctness of the other parts of this argument, still, in my opinion, the last proposition is incorrect. When Act XXII of 1869 was passed, the jurisdiction of this Court in the Cossyah Hills in no wise depended upon Act VI of 1835. It depended upon the 24 & 25 Vict., c. 104, s. 9. Act VI of 1835, in so far as it conferred jurisdiction upon this Court, was wholly obsolete. Moreover, as already shown, the jurisdiction of the Nizamut Adwalut was, after some discussion, extended to both the Cossyah and Jynteeah Hills, and the jurisdiction of the High Court, which is co-extensive, has been exercised in both tracts accordingly. But s. 3 of Act XXII of 1869 is expressly confined to the Cossyah Hills. The result, therefore, of this construction of Act XXII of 1869 would be that whilst it takes away our jurisdiction in the Cossyah Hills, it leaves it in the Jynteeah Hills. This is very improbable. Ever since the year 1835 both these tracts have been under one administration forming the district of one Deputy Commissioner. The reason

why the legislature was desirous to get rid of the Act of 1835 at all events is not perhaps at first sight quite obvious. But it was, I believe, as follows:—As to that large portion of the Cossyah Hills which lies within British territory, the Act was, as I have said before obsolete. As to any small portion of the Cossyah Hills, if there should be any, which might be considered as not within British territory, the Act, though in terms applicable thereto, could not be enforced. It was, therefore, an Act which it was proper to repeal so far as the Cossyah Hills were concerned, whether our jurisdiction remained or not. I am, therefore, clearly of opinion, notwithstanding the reference to the Cossyah Hills in s. 3 and the repeal of Act VI of 1835, that the Act of 1869 does not itself take away the jurisdiction of the High Court either in the Cossyah or in the Jynteeah Hills.

Nor do I think that the Act, taken as a whole, evinces a final determination on the part of the legislature that the jurisdiction of the High Court shall be taken away. I will assume that if it did so, there would be then nothing to prevent the operation of the Act. I will assume that the operation of an Act complete in all its parts, may be suspended by the legislature until something is done by an officer of Government. This might be considered merely as a method of promulgation, and not as any delegation of authority at all. It would be the same as if the Act had been directed to come into operation on its being printed at length in the *Calcutta Gazette*. If, therefore, this be the true construction of the Act, I am not prepared, as at present advised, to say that it could not operate. As regards the Garo Hills, the Act (always excepting s. 8, which presents special difficulties of its own which I need not now consider) may, I think, bear this construction. But as regards the Cossyah and Jynteeah Hills, the Act cannot, I think, be so construed. The frame of the Act as to the Garo Hills, and as to the Cossyah and Jynteeah Hills is entirely different. If the legislature had had the same final intentions as to removing the Cossyah and Jynteeah Hills from the jurisdiction of the ordinary Courts as it may, I think, notwithstanding s. 2, be considered

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to have had in respect of the Garo Hills, the preamble of the Act would not have been limited to declaring the expediency of removing the Garo Hills only from the jurisdiction of those Courts. It would have declared the expediency of removing the Cossyah and Jynteeah Hills also. It is true that the preamble of an Act cannot limit the express words. But here the express words are in accordance with the preamble. The power to bring the Act into operation generally is conferred by s. 2. The power to extend the Act to the Cossyah and Jynteeah Hills is given quite separately and in different language by s. 9; and it is not a power to extend the Act simply, but to extend "all or any" of the provisions of the Act. The Lieutenant-Governor might, for example, have applied ss. 6 and 7 to the Cossyah and Jynteeah Hills, but not s. 4, in which case our jurisdiction would have remained as before. It cannot, I think, be said that a power of extension so conferred makes the Lieutenant-Governor the mere ministerial officer who is to promulgate the Act. It vests in the Lieutenant-Governor a double discretion; first whether the Act shall come into operation in the Cossyah and Jynteeah Hills at all; and secondly, if so, what portion of it shall there operate. I do not mean to say that this is all the discretion vested by the Act in the Lieutenant-Governor. He may by s. 8 apply or not apply to these territories all or any portion of any law applicable to other parts of Bengal. But this portion of the Act is not now immediately before us. I am at present only considering s. 9, and what discretion that section leaves to the Lieutenant-Governor as to the application to the Cossyah and Jynteeah Hills of s. 4 Reading s. 9 by itself, the discretion appears to me to be absolute. Reading the whole Act, I can find no words which can carry any further inference than this—that the legislative Council, when it determined it to be expedient to remove the Garo Hills from the jurisdiction of the ordinary Courts, at the same time contemplated the possibility of its being expedient to remove the Cossyah and Jynteeah Hills from this jurisdiction also. But this they left an entirely open question to be decided by the Lieutenant-Governor of Bengal.

It is not of course in any way necessary now to establish that there is no legislative discretion left to the Lieutenant-Governor as to the application to this Act to the Garo Hills. But it is, I think, desirable to show that the discretion (if any) under s. 2, and the discretion under s. 9, are wholly different both in kind and degree. For this purpose we may consider the matter in this way. It is just possible to conceive that the Lieutenant-Governor of Bengal might not choose to issue the notification under s. 2, and that the Governor-General in Council might not choose to compel him to do so. The legislature would then have been helpless: the Act would never have come into operation at all; it would have wholly miscarried; and the intention of the legislature would have been defeated. But would the intention of the legislature have been defeated if the Lieutenant-Governor had given the notification under s. 2, and had not extended s. 4 of the Act to the Cossyah and Jynteeah Hills? I think not. In the one case the legislature counted on the action of the Lieutenant-Governor as a certainty; in the other case, they left him to act or not as he pleased. Then again, the moment the Act came into operation by the issuing of the notification under s. 2, the jurisdiction of the ordinary Courts in the Garo Hills was destroyed by the imperative words of s. 4. But even when the Act had been thus brought into operation there is still not a single imperative word applicable to the Cossyah and Jynteeah Hills at all. Even then it is only said that the Lieutenant-Governor "may from time to time extend" to certain districts "all or any of the provisions of the Act." What ground is there for saying that the intention of the legislature would have been defeated if the Lieutenant-Governor had declined to exercise any portion of these powers?

Another way of looking at s. 9 was suggested in the course of the argument. It was said that s. 9 might be looked at merely as dealing with a question of boundaries; that all the districts mentioned in the Act, the Garo Hills, the Cossyah and Jynteeah Hills and the Naga Hills were conterminous, and that in such wild and barbarous districts as these it would be impossible for the legislature to fix the exact limits of the

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application of the Act. I think this suggestion does not accord with either the geographical or the historical facts. Although the Garo Hills and the Cossyah and Jynteeah Hills and the Naga Hills are contiguous, they are three entirely separate districts. The Garo Hills belong to the Commissionership of Cooch Behar; the Cossyah and Jynteeah Hills and the Naga Hills to the Commissionership of Assam. The boundary between the Garo Hills, the Cossyah and Jynteeah Hills, and the Naga Hills is generally well defined. In point of size the three districts are about equal, the Cossyah and Jynteeah Hills being rather the largest. The policy of the Government has always been to keep the Garo Hills out of the jurisdiction of the regular Courts, and these Courts have never established their jurisdiction in that district. On the other hand, the policy as to the Cossyah and Jynteeah Hills was to bring them under the ordinary jurisdiction of the Courts; and this jurisdiction was fully established and in action without inconvenience from 1835 up to 1871. The Garos are said to be wild and barbarous tribes, whom the Government in 1869 were still endeavouring to reclaim to the habits of civilized life. No such assertion, as far as I am aware, could be made with regard to the inhabitants of the Cossyah and Jynteeah Hills. The district is a peaceable one; the inhabitants of it carry on peaceful persuits. There are within it two considerable European stations, one of which is the seat of the Local Government of Assam. There are also many Europeans living in Cossyah and Jynteeah Hills, most of them in the service of Government, but some are settlers. The determination, therefore, to exclude the ordinary Courts of law from the Garo Hills would depend upon considerations having no application whatever, or at least only a very modified application, to the Cossyah and Jynteeah Hills. Moreover, there was a special cause which led to the legislation of 1869 as regards the Garo Hills. There had been a decision of this Court, which in effect decided that the Government had been wrong in treating certain portions of the Garo Hills as not within the jurisdiction of the ordinary Courts of justice. It was to counteract the result of this decision that the Act of 1869 was passed. It was in fact an Act passed to legalize the

status quo. But the same Act, when introduced into the Cossyah and Jynteeah Hills, instead of continuing a state of things already in existence, entirely revolutionized the long established administration of the district. It threw back people who had been living for thirty-five years under a regular and settled administration according to established laws into a condition which every one would acknowledge to be only suitable to a people just emerging for barbarism,—that is to say, a condition in which all the powers of Government were centred in the hands of a single individual. This may have been necessary. I do not presume to say that it was not so. But there is nothing in the frame of the Act of 1869, or the circumstances of the case, which would lead me to suppose that simply because this was done in the Garo Hills it was necessarily intended to be done in the Cossyah and Jynteeah Hills also.

I think, therefore, that the legislature did not decide by Act XXII of 1869 that in the Cossyah and Jynteeah Hills the jurisdiction of the ordinary Courts should be excluded; that it did not express any opinion whatsoever upon that question, but that it left the decision of it to the absolute and uncontrolled discretion of the Lieutenant-Governor.

This being the view that I take of Act XXII of 1869, it becomes necessary to consider whether it falls within the legislative powers of the Governor-General of India in Council to delegate to the Lieutenant-Governor of Bengal the power of determining whether or no a particular district of British India shall remain subject to the jurisdiction of the High Court.

Now in order to ascertain this we must go back to that which is the root of the whole matter, the 24 and 25 Vict., c. 104, s. 9, which (as we are all agreed) alone makes the High Court subject to any legislative control in this country; and the question comes to this. When Parliament made the High Court subject to this legislative control, did it thereby intend to enable the Indian Legislative Council to transfer that control to another person, or did Parliament intend that that control should be exercised by the Legislative Council of India itself?

The argument that such a transfer of authority may take place, has been put by at least one of the learned Counsel who

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argued this case for the Crown on very high grounds. It is said that the legislative powers of the Governor-General of India in Council mentioned in s. 9 of the 24 & 25 Vict., c. 104, are those legislative powers which are conferred by the Councils' Act (24 & 25 Vict, c. 67); that except as regards the seven heads specifically mentioned in s. 22 of the latter Act the Indian legislature has a power co-equal with that of Parliament; that there is no restriction as to the mode of legislation; that the power of the Indian legislature to delegate its authority is no more to be questioned than the power of Parliament to do the same; and that every possible and imaginable power of Parliament not specially excepted in the Councils' Act is conferred. Stress was also laid on s. 45 of 3 and 4 of Will. IV, s. 85, which provides that laws made by the Indian legislature shall have the same force as an Act of Parliament.

This question although not, as I shall hereafter show, devoid of authority, has never been discussed at length, as far as I am aware, by any English Judges. The task of laying down the principles upon which such a high and important question is to be determined is an extremely difficult one, and I approach it with the greatest diffidence. But it is, nevertheless, one which in the present case I am bound to attempt.

Before proceeding to consider the general question, I will consider an argument which was addressed to us, in order to show that the Courts of law have no jurisdiction to enter upon a consideration of this question at all. It was said that, if there be any limits to the legislative powers of the Governor-General in Council, they are political limits, and not legal ones, and that the question I am about to consider is a political one upon which Courts of law are not empowered to enter. All doubt upon this part of the case may, I think, be cleared up by a consideration of the difference between a sovereign or supreme and a subordinate or restricted legislature. No one would contend that the Indian legislature is itself sovereign. It exercises sovereign powers, but by delegation only, and is subordinate to Parliament. This is made clear by the 3 & 4 Will. IV, c. 85, s. 51, which is applicable to the present Legislative Council (see 24 & 25 Vict., c. 67, s. 2), and which reserves to Parliament

the full power still to legislate for India, and to "control, supervise, and prevent all proceedings and Acts whatsoever of the Governor-General in Council." And it is well known that Parliament does exercise a control as regards the affairs of India which it does not exercise in any other dependency of the British Crown. The Indian budget is annually laid before Parliament. Indian questions are frequently there debated on; and inquiries are constantly being there made by committees and otherwise into the conduct of affairs by the Government of this country. Now, the reasons why Courts of law cannot examine the validity of Acts passed by a sovereign or supreme legislature, have no application whatsoever to the Acts of a subordinate or restricted legislature. Of course, within its competency, the Acts of a subordinate or restricted legislature are, to use the expression of Chancellor Kent, "as absolute and uncontrollable as laws flowing from the sovereign power," (1), and I may remark in passing that this explains how it is that the Acts of the Indian legislature, if duly authorized, come to be equivalent to Acts of Parliament. But the question whether the Act is or is not within the competency of the legislature must, as the same learned author points out, of necessity fall within the province of Courts of law to determine. The same principle was laid down by the supreme Court of the United States in a case quoted by Chancellor Kent at page 453 (2). There the Chief Justice points out that the powers of the legislature are in America (as they are in India) defined and limited by a written constitution, "but," he proceeds to say, "to what purpose is that limitation, if those limits may at any time be passed? The distinction between a. Government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if Acts prohibited and Acts allowed are of equal obligation . . . . . The theory of every Government with a written constitution forming the fundamental and paramount law of the nation must be that an Act of the legislature repugnant to the constitution is void.

(1) Kent's Com., 448., Vol I, 11th ed., p. 485.

(2) Kent's Com., Vol. I, 11th ed, p 490.

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If void, it cannot bind the Courts, and oblige them to give it effect; for this would be to overthrow in fact what was established in theory, and to make that operative in law which was not law. . . . . If the constitution be superior to an Act of the legislature, the Courts must decide between these conflicting rules; and how can they close their eyes on the constitution and see only the law." In order properly to understand these observations and to apply them to the present case, it must be borne in mind that the words 'constitution' and 'constitutional' as here used do not mean precisely the same thing as with us, and the distinction is most important, as upon its due observance depend the exact limits of the competency of Courts of law to enquire into the validity of the Act of a subordinate legislature. The Parliament of England, although absolutely sovereign and supreme, is restricted by limits which are called constitutional, and we speak of certain principles of the English constitution as being inviolable. But Parliament being in the eye of the law absolute. can do that which a subordinate legislature cannot do. It can, in the eye of the law by its own ordinary proceedings, alter the constitution. The proceedings, therefore, of Parliament can never be questioned upon constitutional grounds by Courts of law. The constitutional restriction has, *ex hypothesi*, been already cut away by paramount authority before the question arises. But not so where there is a written constitution issuing from an authority superior to that of the legislature whose functions it defines. There the constitutional restrictions always operate until the superior authority has removed them and the Courts of law are bound to give effect to them. Moreover—which is most important, as showing that the question to be decided is, in the strict sense of the word, a legal and not a political one—the restrictions, here, as in America, exist in a written form, so that the only question the Court has to determine is the ordinary one—what was the intention of the sovereign power when it created the subordinate legislature? I desire it to be fully and clearly understood that I treat this as an ordinary question of construction of an Act or Acts of Parliament, and I do not intend to enter into any political considerations whatsoever.

I also desire to say that I in no way countenance the doctrine which has been put forward by some eminent authorities, but which I believe to be now exploded, that Courts of law can question the validity of Acts of the legislature upon general considerations of religion, morality, natural justice, the so-called social contract, or other similar grounds. I have repudiated this doctrine already in the case of the *Queen* v. *Ameer Khan* (1), and I do so again. Where an Act has once been passed by a legislature which is supreme, I consider it to be absolutely binding upon Courts of law. Where it is passed by a legislature the powers of which are limited, it is not the less binding, provided it be not in excess of the powers conferred upon the limited legislature. I may seem to some persons to be here repeating mere truisms. but I know by experience how much one is liable to be misunderstood when speaking upon such subjects as these.

Being, therefore, of opinion that it is not only within our power, but that it is our duty to say whether the authority given to the Lieutenant-Governor to take away the jurisdiction of this Court was validly conferred, I proceed to consider the general and important question, whether the Councils' Act enables the Legislative Council of India to transfer to others the powers which Parliament has conferred upon itself.

Now, what is the broad principle generally applicable to all cases where an authority is given to one person to do acts on behalf of another, which authority involves personal trust and confidence in the agent, and is to be exercised by him in a particular manner? It will, I think, be admitted that the agent is bound himself to perform the acts for which he is authorized according to the manner indicated; and that he cannot transfer to others the confidence reposed in himself. No doubt, this principle has been generally laid down with reference to dealings between private individuals, but it appears to me to be equally applicable to the case of public functionaries Parliament has said that the Governor-General of India, together with certain other specified persons whose qualifications are

(1) 6 B. L. R., 482.

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mentioned, may make, at meetings duly constituted, laws for the people of India. To that extent it has delegated its own sovereign authority to the Indian legislature. But, undoubtedly, this delegation of authority was made in view of the special qualifications of the persons in whom this power is reposed, and of the safeguards which arise from the publicity and deliberation of the proceedings of a legislative body which can only transact business at meetings duly convened and constituted. Did Parliament intend to be itself the sole judge of what persons were thus qualified, and what safeguards were necessary for that purpose; or did it intend to leave to the legislature here the power to substitute any persons whom they might consider sufficiently well qualified and any safeguards which they might consider sufficiently effectual? That is the question we have to decide.

The only ground upon which, as it appears to me, it can be maintained that the Indian Legislative Council may transfer to others the powers entrusted to itself is the broad and general ground upon which it was placed by the learned Standing Counsel Mr. Kennedy, who argued with great force and ability that the power to do this is involved in the power to make laws. It was pointed out that there is a difference between a general power to make laws and a particular power, for example, to grant a lease or to execute a deed. If I give a man a power to execute a deed, and he transfers that power to some one else, he has done something clearly not authorized by the power which was restricted to the single act of executing a deed. But where Parliament has conferred upon a legislature the general power to make laws, the only question can be, is the disputed Act a law? If it is, then it is valid, unless it falls within some prohibition. I think that this argument is sound, and that it must be met if the validity of Act XXII of 1869 is denied.

Now, first, as to this Act being a law, I am clearly of opinion that it is not a law in the proper sense of the word. I am at present only speaking of the Act so far as the Cossyah and Jynteeah Hills are concerned As to those hills, in the view that I take of it, this Act commands no one to do or to forbear

from doing anything. It is simply a signification that a particular person may in those hills either do or not do certain things as he likes. That it is not a law in the ordinary acceptance of the word. I will not take the definition of 'law' as given by so accurate and precise a writer as Austin, since it may perhaps be objected that his views cannot be applied to British Acts of Parliament. But no one will make this objection as regards Blackstone, and how do we find that Blackstone defines a law? He says, a law "is that rule of action which is prescribed by some superior and which the inferior is bound to obey" (1). Tried by this test Act XXII of 1869 is not a law. I need not here advert to the distinction between substantive and adjective law, the ultimate object of both being the same; nor do I say that amongst the multitudinous varieties of meaning which have been attributed to the term 'law,' a mere permission to legislate could never be called a law. Any authoritative expression of intention might, by some persons under some circumstances, be called a law. But when a Legislative Council was constituted in India distinct from the Executive Council with power to make laws at meetings held for the purpose, I think it was clearly intended to restrict the Legislative Council to the exercise of functions which are properly legislative,—that is, to the making of laws which (to use Blackstone's expression) are rules of action prescribed by a superior, to an inferior, or of laws made in furtherance of these rules. The English Parliament is not so restricted. It is not only a legislative but a paramount sovereign body, and many of its Acts are not laws according to Blackstone's definition, though as being authoritative expressions of intention they might be sometimes so called. The Indian Legislative Council cannot, in my opinion, do all that Parliament can do, even where there is no express prohibition. The powers concentrated in Parliament are in India divided between the Executive and the Legislative Councils. The Executive Council alone has the superintendence, direction, and control of the whole civil and military government of the territories and revenue of India (3 & 4 Will. IV, c. 85, s. 39). The

(1) Vol. I, p. 38.

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Legislative Council has the power of making laws only. In England also no doubt, as in India, the executive functions of Government are generally exercised by a body distinct from Parliament, by what (in a special sense) is called 'the Government," but there is no *legal* impediment to Parliament taking upon itself executive functions, and the executive authorities are all responsible to Parliament for the way in which they exercise their executive powers. Indeed, to some extent, Parliament does exercise purely executive functions, as, for example, when it fixes the amount of the naval and military forces, or appropriates the public revenues The difference in India is this. That the Executive Council and the Legislative Council are two co-ordinate and independent bodies, each having its own separate functions with which the other cannot legally interfere. For these reasons, I think that the Legislative Council, when it merely grants permission to another person to legislate, does not make a law within the meaning of the Act from which it derives its authority.

I have discussed this question with reference only to the word 'laws.' The Act of Parliament uses the expression "laws and regulations." No reliance was placed in the argument on the use of the additional word, and I think myself that it is merely redundant.

But I quite admit that, in order fully to appreciate the powers of the Indian legislature, we must not fasten our attention solely upon the meaning of a single word. We must look to the whole Act, and gather from it what were the intentions of Parliament in this respect. Indeed, we must look further. In order properly to understand the frame and intention of the Councils' Act we must consider the whole action of Parliament with regard to legislation in India from the year 1833 down to the present time. In the year 1833, by the 3rd & 4th Will. IV, c. 85, s. 43, the Governor-General in Council was empowered to make laws and regulations. Under this Act there was but one authority in India, "the Governor-General of India in Council." There was not as now a separate council for making laws and regulations. But by s. 48 all laws and regulations were to be made at some meeting of the Council

at which the Governor-General and at least three of the ordinary members of Council were assembled; and at which alone the legal member of Council (as he was called) was entitled to vote. By s. 70, the Governor-General in Council was expressly permitted to authorize the Governor-General alone to exercise all the powers which might be exercised by the Governor-General in Council, except the power of making laws and regulations.

From this time nothing occurred, as far as I am aware, to affect the constitution of the legislative authority in India until the year 1853, when by the 16th and 17th Vict., c. 95, the constitution of the Legislative Council was entirely altered by the addition of members who did not belong to the Executive Council. A distinction between the legislative and executive functions of Government is observable in the Act of William the Fourth, but this Act puts the distinction upon much clearer ground. It puts those functions into the hands of two separate bodies. Owing to the power which the Executive Government has over the appointment of members, and for other reasons, its influence in the Legislative Council is still supreme. But the change in the constitution of the Legislative Council introduced by this Act is, nevertheless, of importance as emphasizing the distinction between legislative and executive functions. There is also no doubt that henceforth a conflict of opinion between the Executive and Legislative Councils was, theoretically, at any rate, no longer impossible.

In the next year, Parliament, by the 17th and 18th Vict., c. 77, granted to the Executive Council power to take any district under its own immediate authority, and to give all necessary directions respecting the administration of such districts or otherwise to provide for the administration thereof: provided always that no law or regulation should be altered except by laws made by the Legislative Council. This power to issue orders and directions is no doubt, to some extent, a legislative power, and the Act shows how very cautiously provision was made by Parliament for a change in the legislative machinery in India. It is to be observed also that this very limited power is conferred not upon the Legislative Council but upon the

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Executive--a peculiarity which, as we shall see, is preserved through all the Acts of Parliament relating to this subject.

The next Act is the Councils' Act. That Act re-confers the general power of making laws and regulations for the whole of India upon a Legislative Council somewhat differently constituted from what it had been previously, but still one quite distinct from the Executive Council. The Act provides how the members of the Legislative Council are to be appointed; how they are to resign their offices; and, for the validity of acts notwithstanding certain defects in the constitution of the Council, it declares that the power of making laws shall be exercised by the Council only at meetings duly constituted in the manner directed by the Act; it provides how meetings of the Council are to be convened and adjourned, and how rules for the conduct of business are to be made, and one important rule for the conduct of business is, by s. 19, laid down by Parliament itself. It is also remarkable that the Indian legislature does not exercise absolute control over the rules for the conduct of its own business, nor any control over its own adjournments; the first is partly, and the second entirely, under the control of the Executive Government. The Act also confers a somewhat more restricted, but still, as far as it goes, general, legislative authority upon Local Council in Madras and Bombay. Then, dealing with the subject of a change in the legislative machinery, the Act empowers the Governor-General in Council, that is the Executive Council, by proclamation to establish local Legislative Council in other parts of India, each of which would possess, in regard to its own particular district, a general power to make laws similar to that possessed by the Local Council established by the Act. Thus we find provision in the Act for the establishment and constitution of, and the conduct of business by, the three Legislative Councils. We also find power to create new Local Councils given to the Executive; and it is also provided how these Local Councils are to be constituted and how they are to conduct their business. As to any other changes in the legislative machinery the Act is wholly silent.

The next Act is the 33 Vict., c. 3, expressly passed to make better provision for ordinary laws in certain parts of India.

It was found, no doubt, that the machinery of even a local legislature was too cumbrous for certain outlying districts, and this Act, accordingly, enables the Executive Government, under certain special restrictions, to make regulations (the word 'laws' is not used) in a particular manner without any resort to the Legislative Council But this can only be done in those parts of India as to which the Secretary of State in Council shall declare the provisions of the Act applicable. In short, the Act provides a very special and guarded method of doing that which it is now said that the Indian legislature may do without limit or restriction.

We see, therefore, that these Acts of Parliament nowhere confer any express power upon the Indian legislature to change the machinery of legislature in India, but they do confer that power subject to important restrictions upon the Executive Government. Now Parliament, in conferring this power upon the Executive Government, necessarily proceeded upon one of two views. Either it considered that the Indian legislature had power to change the machinery of legislation in India, or it considered that it had no such power. In other words, Parliament, when these Acts were passed, either considered that it was making the sole and only provisions which existed for changing the legislative machinery in India, or it considered that it was conferring powers which need only be resorted to when the Executive Government could not obtain the powers which it required from the Legislative Council. I have come to the conclusion upon reading these Acts of Parliament that Parliament considered itself to be making the only provisions which existed for changing the machinery of legislation otherwise than by an Act passed by itself. In the first place, whatever theoretical difficulty might be imagined as arising out of a conflict between the Executive and Legislative Councils, I do not think that any one ever seriously contemplated that any such difficulty could occur. The existence of the Legislative Council secures publicity and deliberation in regard to the legislative action of Government. But the actual power of Government still remains for all practical purposes with the executive. I do not think, for example, that Parliament passed such an Act as the 33 Vict., c. 3,

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merely in view of such a contingency as a conflict between the Executive and Legislative Councils. In the next place, though it is not impossible, I think it unlikely, that powers to make fundamental changes in the constitution would have been placed by Parliament simultaneously in the hands of two co-ordinate and independent bodies. In case of these two bodies working harmoniously, such a double power would be useless. In case of their working inharmoniously, such a double power would, as it seems to me, be objectionable. The very fact, therefore, that Parliament bestowed this power on the Executive Government of India seems to me to show that it did not already exist in the legislature. But after all, what is most important, I cannot reconcile the language of these Acts of Parliament with the existence of the power now claimed for the Legislative Council of India. We must consider what the nature of the claim really is. It is nothing less than this, that the constitution of India as created by Parliament in these Statutes is a merely provisional one; that all the directions as to the mode of exercising legislative authority are only to remain in force and effect so long as the legislature may choose that they should do so. That the separation which these statutes make between the exercise of legislative and executive functions may be nullified, and all the powers now held by the legislature may be retransferred to any executive officer it may select, whenever it pleases to do so. The legislature may, indeed, still continue to exist, but it may abrogate all its functions by transferring them to some one else. I do not so read these Acts of Parliament. I think that Parliament intended the provisions which it made for the exercise of legislative power in India to be permanent until altered by itself, and that it did not intend to give the Indian legislature power to repeal them. It may be that there is not much in India to which the term 'constitution' can be properly applied. But there is something. The laws must now be made publicly and with deliberation. I do not think this provision either worthless or unimportant, and its worth and importance is greatly increased by the fact that it is the only protection which exists in this country against hasty or arbitrary legislation. The Counsel for the Crown argue

that this protection may be swept away by the Indian legislature, and its powers of legislation placed in the hands of a single individual. I do not think so. I think this protection was provided by Parliament for the people of India, and that it is only under the express authority of Parliament itself that they can be deprived of it.

Moreover, if we consider at one view the Acts of Parliament which have been passed during the last forty years, we cannot help seeing that there has been a considerable conflict of principles in dealing with Indian Legislation. At one time there was an attempt to place the legislative authority for the whole of India in a single council. This authority has been in part decentralized by the establishment of Local Councils; and from time to time, in respect of certain districts, the legislative authority, after having been once separated from the executive, has been, under the express authority of Parliament, again confounded with it, and all powers without distinction have been again placed in the hands of the Executive Government where they originally resided. I believe that there is no doubt what the origin of this conflict and of these changes was. Whilst it was considered desirable to secure for the people of India that the functions of legislation should be separated from the other functions of Government and should be performed with publicity and deliberation, it was found impossible that this should be done by a single council, or even, entirely so, by a general council with the assistance of several local councils. Parliament has, therefore, from time to time relieved these bodies from the pressure of an extreme difficulty. We even know that to avoid the slow and tedious method of regular legislation the executive authorities did, in former times, assume the power to legislate otherwise than in the regular manner for certain districts of India. This was done to a large extent in the Non-Regulation Provinces. But in the whole course of the controversy which has thus arisen, and the pressure thus felt, I have never seen the claim distinctly put forward, that the right to change the legislative machinery in India was included within the general power to make laws, and was one which Parliament had entrusted to the discretion of Indian Legislative Councils.

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As far as I am aware, this easy and simple solution of the difficulty, namely, that these bodies have the general power to transfer their legislative authority to others has never been before asserted; and no direct attempt to change the machinery of legislation in India by any Indian Legislative Council has ever yet been made.

Upon the whole, therefore, it seems to me that the fair and reasonable conclusion is this,—that Parliament has provided for the exercise of the legislative authority of India by certain councils at meetings duly constituted; further that, if any change in the legislative machinery is necessary, Parliament has provided how and by whom that change is to be made; that the power to make this change is vested by Parliament in the Executive Government alone, no such power being vested in any of the Legislative Councils. These arrangements for the exercise of legislative authority and for the changes in legislative machinery depend upon five Acts of Parliament; the 3 & 4 Will. IV, c. 85; the 16 & 17 Vict., c. 95; the 17 & 18 Vict., c. 77; the 24 & 25 Vict., c. 67; and the 33 Vict., c. 3. The Indian legislature is expressly forbidden to make any law which shall repeal or any way affect the provisions of any one of these five Acts. Four of these Acts are expressly named in the prohibitions,—one in the first head of prohibition and three in the second. The remaining one is included in the general prohibition contained in the sixth head. In the view that I take, the Indian legislature cannot change the legislative machinery in India without affecting the provisions of these Acts of Parliament which created that machinery, and if it does in any way affect them, then. *ex consensu omnium*, its Acts are void.

On both grounds, therefore, both because Act XXII of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law, and because if it is a law it is one which the Legislative Council of India is expressly prohibited from making, I should hold that it is so far void.

I have dealt with this case upon the broad grounds upon which Mr. Kennedy put it. He boldly claimed for the Indian Legislative Council of India the power to transfer its legisla-

tive functions to the Lieutenant-Governor of Bengal. Index, as I understood him, the only restriction he would admit was that the Legislative Council could not destroy its own power to legislate, though I see no reason why he should stop there. The Advocate-General did not, I think, go quite so far. But in my opinion there is no narrower question which can be substituted for the broad and general question which the learned Council put and which I have considered. There are no words in the Acts of Parliament upon which legislative authority could be made transferable in one class of cases and not in others. Of course, I do not for a moment suggest that every time discretion is entrusted to others there is a transfer of legislative authority. Every Act of the legislature abounds with examples of discretion which is entrusted to the judicial and executive officers of Government, the legality of which no one would think of questioning. And there may be particular cases in which it would be a matter of considerable difficulty to say whether or no the discretion conferred was of the legislative kind. When the difficulty arises we must deal with it. But in the present case we have not to cope with this difficulty. By the express words of 24 & 25 Vict., c. 104, s. 9, it is only by legislation that the jurisdiction of this Court can be taken away. Whoever, therefore, takes away the jurisdiction of this Court must exercise legislative authority for the purpose. I have stated my reasons in an earlier part of this judgment for holding that it was wholly by the Lieutenant-Governor, and not in any sense or to any extent by the Indian Legislative Council, the jurisdiction of the High Court was assumed to be taken away. The broad and general question seems to me, therefore, necessarily to arise—can the legislature confer upon the Lieutenant-Governor this legislative power?

I now come to a decision which, as it appears to me, strongly fortifies the conclusion I have come to as to the powers of the Indian legislature. Indeed, it is a decision which I rely upon far more than my own reasoning, and which we must overrule if we are to adopt the construction of the Councils' Act contended for by the Crown. In the year 1850 a suit was brought in the late Supreme Court against a servant of the Commissioners

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for the Improvement of the Town of Calcutta for the illegal seizure of a buggy. The defendant justified the seizure under Act XVI of 1847, and certain rules which the Commissioners had made under that Act, alleging that the plaintiff had not paid the carriage tax assessed upon him by the Commissioners. The plaintiff demurred to the plea, raising a question as to the legality of these rules. The first judgment was delivered by the Chief Justice Sir Lawrence Peel as the judgment of himself and Sir James Colvile. On that occasion the Court intimated a strong opinion that, if these rules varied the law, they were void notwithstanding that they were made under the express authority of an Act of the legislature. When after an amendment of the pleadings, the same question again arose, Sir Lawrence Peel gave the joint judgment of himself, Sir James Colvile, and Sir Arthur Buller. I have referred to the Registrar's book and this shows (which the report in Taylor and Bell does not) how the Court was constituted on the two occasions on which the case was before it. The important passage is the first paragraph in the second judgment, and is to be found at page 479 of the Report in Taylor and Bell. The learned Judges, though they express great doubts whether the rules in that particular case were legal and binding, do not finally decide that point. But they do clearly and unmistakeably lay down as a general principle of law applicable to India, that any substantial delegation of legistive authority by the legislature of this country is void. The actual order made was a second permission to the defendant to amend his plea upon payment of costs. The second amendment was made, but I cannot find that the case went any further, and probably it was compromised. The Act itself was shortly afterwards repealed.

The case was very fully argued on two occasions, the defendant being represented by the Advocate-General and the Standing Counsel, and it is in all respects an authority which seems entitled to the very greatest weight.

I am also disposed to think that if the American reports were available to us, we should find some authority there on this part of the case. There are several decisions of the American Courts referred to in a note to Kent's Commentaries, page 504.

One cannot be quite sure without seeing the reports *in extenso* how far these decisions go, but they seem to me to support the view that Act XXII of 1869 is, as regards the Cossyah and Jynteeah Hills, not a law.

It was asked in the course of the argument what was to be done in the case of emergency, and whether the Legislature might not do that which was necessary to meet an emergency? And assuming the answer to this question to be that the Legislature might do what was necessary, it was then argued that the Court could not enquire whether the emergency existed or not, for of this the Legislature was the sole judge. In fact, whilst asking us to dismiss all political considerations, the learned Counsel ask us to decide this case on the ground of political necessity. But we have nothing to do with any such question at all. Upon an emergency in which danger to life and property is involved, the law as it stands, and without any alteration, gives increased and exceptional powers to the executive. In extreme cases the executive may suspend the operation of all laws. But I am not aware that such emergency in any way affects the powers of the Legislature; certainly not unless the Legislature were actually overawed.

Lastly, it was said that whether the Indian Legislative Council can or cannot lawfully delegate the power to make laws, it had done so for a long series of years, and a long list of Acts passed between 1845 and 1868 has been handed in to us, all of which, it is said, must be treated as instances of delegation of legislative authorty, if Act XXII of 1869 be so treated. It was then argued that Parliament must have known what the Legislature of this country had been doing, and, had it not approved what was done, would have used language which would have placed the illegality of these proceedings beyond all possible doubt. I have some difficulty in dealing with an argument based upon an assumption of fact in a matter of this kind. I imagine that Parliament, when legislating for India, is dependent mainly upon such information as may be imparted to it by the Secretary of State, or by individual members who have a special acquaintance with this country. The position is, in fact, substantially the same in this as in all other cases where

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the subject of legislation is not one of every-day experience If the information thus obtained were not found to be sufficient, special inquiries would then be directed. Whether in the particular case under consideration Parliament did really arrive at a knowledge of the particular provisions in these Acts which are now relied on, I am at a loss how to determine. I cannot, however, think that we need enter upon this inquiry. For even if we presume knowledge, still to infer ratification from silence would lead to consequences which seem to me inadmissible. Upon one particular point Parliament expressly refers to the practice here, and no doubt, therefore, was so far acquainted with it. In s. 25 of the Councils' Act it is recited that doubts have arisen as to the power to make laws for the Non-Regulation Provinces, otherwise than at regular meetings of the Legislative Council in conformity with the 3 & 4 Wm. IV, c. 85. The section then goes on to give validity to laws that had not been so made. But it has never been contended that this recital and this ratification have legalized the previous practice. On the contrary, the accepted view has, I believe, always been that the previous practice was put an end to by this very Act. Speaking of this very practice in a minute recorded in 1868 Sir Henry Maine says—"this system, of which the legality had long been doubted, was destroyed by the Indian Councils' Act. No legislative authority now exists in India which is not derived from this Statute." But if the argument of tacit recognition which I am now considering be correct, how is it possible to escape the conclusion that all the vague powers, half legislative, half executive, previously exercised in the Non-Regulation Provinces are valid and subsisting powers? The argument seems here to stand on its strongest ground.

Nor do the Acts contained in the list which was handed in appear to me to afford (as was asserted) so many clear and undisputed instances of a transfer of legislative authority. I must guard myself against being drawn into a final expression of opinion as to the construction of Acts which are not properly before us. I must also observe that the argument only extends to Acts passed prior to the Councils' Act. It is not, and could not be, contended that the Indian

legislature can have increased its own powers by any recent usurpation. This gets rid of the two Acts most relied on,—namely, Act XXIII of 1861, s. 39, and Act XXV of 1861, s. 445. Neither of these Acts had been passed when the Councils' Act received the Royal assent, though, probably, they were passed before the Councils' Act came into operation. I may also observe that these sections only confer powers on the Executive Government to extend the Acts to Non-Regulation Provinces. But we know that as to these districts certain exceptional notions were at that time held which are now exploded. As to those Acts which were passed prior to the Councils' Act becoming law, Act VIII of 1859, s. 385, and Act XIV of 1859, s. 24, also relate only to Non-Regulation Provinces. Act VII of 1845 only empowers the Local Government to make rules respecting the levying of water-rates and so forth for canals which have been constructed at the expense of Government. Act XXXV of 1850 and Act XXXVI of 1857 give to the Local Government powers which are not legislative, but may be judicial. Act XVIII of 1853 seems to me merely to give power to fix the limits of cantonments. Act XVII of 1854 reserves to the Governor-General in Council powers which he would have had without this reservation. Act XXII of 1855, Act XX of 1856, Act XXIV of 1859, and Act V of 1861 are more difficult to construe. It would certainly have been safer to treat them as what are called General Clauses Acts. and for the Legislature in each case to have sanctioned their extension. But I may observe generally as to the provisions which these and many other Acts contain for the making of rules by the Executive Government in conformity with the Act, that we have the very high authority of the Judges who decided the case of *Biddle* v. *Tariney Churn Banerjee* (1), that the power to make such rules may be largely conferred without any delegation of legislative authority. Act XXIX of 1857 does not seem to me to confer any legislative powers at all. Act XXIX of 1858 was passed to meet a pressing

(1) 1 Tay. & Bell, 390; see p. 404.

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emergency during the mutiny, and ought not, I think, to be taken as a precedent. Act XIII of 1859, s. 5, and Act IX of 1860, s. 9, are in my opinion of very doubtful validity. I am not sure that they have ever been acted upon. It is by no means easy to ascertain this, for it is one of the peculiar results of this method of legislation that there is no information upon the subject contained in the Statute book. But this I know that I have often heard the validity of these provisions questioned. Upon the whole, the list of Acts prior to the passing of the Councils' Act does not seem to me to show any clear practice of transferring legislative authority which Parliament can be said to have known and recognized.

Before leaving this I must observe that it contains a number of Acts which were evidently inserted under an entire misconception as to the nature of the difficulty which the Crown has to meet in establishing a claim now put forward on behalf of the Indian Legislature. It has never been doubted that the Legislature may confer discretion of the most extensive kind upon the executive officers of Government. I have already adverted to this, and but for the misconception which this list discloses, I should not have thought it necessary to advert to it again. But it cannot be too clearly understood that no one denies that the Indian Legislature may entrust to the executive officers of Government power, for example, to regulate public processions and to keep order in places of public resort. And the insertion of this provision (Act XIII of 1856, s. 77) in the list handed up only shows how entirely the question before us may be misunderstood. No one would think of challenging such a provision as this, as being beyond the powers of the Indian Legislature. If my view of the law threw any doubt upon the power of the Indian Legislature to pass such an Act as this, I should abandon it at once. But surely it is not necessary to insist at length upon the difference between the delegation of a power to keep order in the public streets, and the delegation of a power to abolish all the existing Courts of justice in a large district, and to substitute such new ones as the *delegatus* may deem advisable. All that can be said is, that

there may be a difficult in some cases in saying whether the Act amounts to a transfer of legislative power. There would be precisely the same difficulty in drawing an exact line between the functions of the legislative and the functions of the executive council—between the powers which Judges possess to make rules of procedure, and the power which they do not possess to make rules of substantive law. But this does not prove that these distinctions do not exist or that they are not to be observed. We are, as I have already pointed out, not now called upon to deal with difficulties of this kind. If we are ever called upon to do so, I do not doubt that the utmost endeavour will be made to avoid impeding the useful action of the legislature. I say with confidence that this Court (the only one of which I have a right to speak) has always shown the greatest care and circumspection in questioning the validity of Acts passed by the Indian Legislature. On the present occasion it has been pressed very strongly that the view of the law which I take would lead to the most disastrous consequences. Nothing has been adduced in support of this statement, which appears to me quite unfounded. I would gladly have refrained from expressing any opinion upon these Acts at all, but not being able to do so, I am compelled to admit that there are some provisions in some of the Acts passed by the Legislative Council the legality of which, upon the view of the law to which I adhere, may be doubtful. But I say distinctly that there is no ground whatever for the sweeping assertion which has been made that, on this view of the law, a very large proportion of these Acts must be at once pronounced to be illegal. No such consequences followed from the decision of *Biddle* v. *Tariney Churn Bannerjee* (1), and my decision goes no further. The only proposition of law which I lay down is, that the Legislative Council of India cannot confer any power to legislate upon the Lieutenant-Governor of Bengal.

In my opinion, our jurisdiction in the Cossyah and Jynteeah Hills is now the same as it was before the notification was issued by the Lieutenant-Governor, and we ought, therefore, to send

(1) 1 Tay. & Bell, 390.

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for the record of this case, in order to see whether the appeal should be admitted.

KEMP, J.—I concur in the judgment of Mr. Justice Markby.

AINSLIE, J.—By 3 & 4 Will. IV, c. 85, s. 43, the Governor-General in Council had power to make laws and regulations for repealing, amending, or altering any laws and regulations whatever then in force or thereafter to be in force in the Indian territories of His Majesty or any part thereof, and to make laws and regulations for all persons and all Courts of justice and the jurisdiction thereof, and for all places and things whatsoever throughout the whole and every part of the said territories, with certain reservations; and by s. 45 all laws made as aforesaid were to have the force and effect of Acts of Parliament.

By 16 & 17 Vict., c. 95, s. 22, provision was made for the better exercise of the powers of making laws and regulations by the addition to the Council of the Governor-General of certain persons as legislative councillors; and by s. 23 it was enacted that the powers of making laws or regulations vested in the Governor-General in Council should be exercised only at meetings of the said Council at which a certain number of members and certain particular members should be present.

By 24 & 25 Vict., c. 67, s. 2, the 43rd section of the Act of William IV, and the 22nd and 23rd sections of the Act 16 & 17 Vict. are repealed, but the 45th section of the former is maintained in force, save so far as the same may be altered by or be repugnant to this Act. Ss. 9 and 10 provide for the constitution of a Legislative Council, and s. 15 restricts the power of making laws and regulations to meetings of the Council at which a certain proportion of members is present; by s. 6 the Governor-General alone is authorised in certain cases to exercise all the powers of Governor-General in Council except the power of making laws and regulations. S. 22 re-enacts the provisions of s. 43 of the Act of William IV, with the

addition that the power is capable of being exercised at meetings of Council for the purpose of making laws and regulations at which by s. 19 no other business can be transacted, and except at which by s. 15 no laws or regulations can be made. S. 25 validates certain laws and regulations therefore made otherwise than at meetings of a Legislative Council in respect of the Non-Regulation Provinces. By s. 23 the Governor-General, in cases of emergency, may make ordinances for the peace and good government of the Indian territories of Her Majesty or any part thereof to have effect for six months only and subject to be controlled or superseded by a law made at a meeting of the Legislative Council. Ss. 34 and 45 restrict the power of making laws and regulations conferred on subordinate Legislatures, so that as in the case of the Council of the Governor-General it can only by exercised at a meeting for the purpose of making laws and regulations, and in no case can they modify Acts of the Imperial Parliament.

The 1st section of 33 Vict., c. 3, provides, that in respect of any part of the territories under the Government or Administration of any Governor, Lieutenant-Governor of Chief Commissioner to which the Secretary of State shall from time to time by resolution declare the provisions of the section to be applicable, the Governor, Lieutenant-Governor or Chief Commissioner, as the case may be, may propose drafts of regulations for the peace and good government of such parts to the Governor-General in Council, which, on receiving his assent and being duly published, shall have the force of laws made at a meeting of the Legislative Council.

There is further a provision in 17 & 18 Vict., c. 77, s. 3, by which the Governor-General in Council (with the sanction of the Court of Directors of the East India Company) could by proclamation take under the immediate authority and management of the Governor-General in Council any part of the territories under the Government of East India Company, and thereupon could give all necessary orders and directions respecting the administration of such part, or otherwise provide for the administration of the same; but this is coupled with a proviso that no law in force at the time in such

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part should be altered or repealed except by a law made by the Governor-General in Council.

The Imperial Parliament has thus carefully declared the mode in which legislation by the Government of India is to be carried on. Ordinarily it is to be by laws made at meetings of the Legislative Council of the Governor-General; under emergencies and for the limited term of six months, by the Governor-General alone; and in respect of particular places, to be defined by the Secretary of State, by the Governor-General in (Executive) Council on the proposal of the Local Government.

When Act XXII of 1869 was passed, the last provisions had not come into existence. This Act was passed by the Governor-General in Council under the general powers conferred by s. 22 of the Indian Councils' Act, subject to the limitations specified in that section.

The question is, whether the Supreme Indian Legislature did itself, directly or by necessary implication, exclude the Cossyah and Jynteeath Hills from the territorial jurisdiction of the High Court. I confine myself to this one matter which is all that we need consider for the purposes of the appeal before us at the present stage of the proceedings. I understand we are all agreed that such exclusion is within the powers of the Legislature.

I think it did not do so, but that it left the question of such exclusion unsettled. The preamble and title of the Act speak only of the Garo Hills; the Cossyah Hills are not mentioned until s. 9 is reached, except that in s. 3 it is said that from the date of the notification provided for in s. 2, Act VI of 1835 (so far as it relates to the Cossyah Hills) shall be repealed. With this exception the first eight sections refer exclusively to the Garo Hills. Then comes the 9th section, which empowers the Lieutenant-Governor from time to time, by notification in the *Calcutta Gazette*, to extend all or any of the provisions of the other sections to the Jynteeah Hills, the Naga Hills, and to such portion of the Cossyah Hills as for the time being forms part of British territory.

This provision for a separate notification makes it clear that no part of the territory mentioned in s. 9 is affected by

the Act in consequence of the notification provided for in s. 2; and that if the Act has any opperation there, it is simply as the result of the will of the Lieutenant-Governor. The repeal of so much of Act VI of 1835 as affects the Cossyah Hills from the date when the Act came into force in the Garo Hills (namely, the 1st March 1870) is of no practical importance; this much of the Act was wholly obsolete. The Courts of Sudder Dewany and Nizamut Adawlut, to which powers of superintendence had been given by the Act, had ceased to exist; and by the 9th section of the High Courts' Act (24 & 25 Vict., c. 104) this Court had been vested with the same powers that the former Courts had. That the Government of India in Legislative Council should take the opportunity of repealing this obsolete Act at the same time that it was dealing with the law applicable to the Garo Hills is not to my mind sufficient ground for saying that the Legislature in September 1869 made a declaration in respect of the Jynteeah, the Naga, or the Cossyah Hills similar to that which it had made in respect of the Garo Hills. As to these last, certain provisions were absolutely enacted, and all that was referred to the Lieutenant-Governor was to fix a day from which they should take effect.

The preamble declares the expediency of dealing with the Garo Hills, but says not a word about the others. The notification necessary to start the operation of the Act in respect of the Garo Hills has no effect in the Cossyah and other hills. Whether or not the Act shall ever come into operation at all in the latter, and if so, the extent to which effect shall be given to it, is left entirely to the discretion of the Lieutenant-Governor. The 2nd and 9th sections are not framed in the same form. The first directs that the Act shall come into operation and that the Lieutenant-Governor shall fix a date of commencement, and merely leaves the particular date to be determined by the Lieutenant-Governor as is commonly done when the introduction of a new law requires some adjustment of the administrative machinery.

The fixing of such date is a ministerial not a legislative act; but the determination whether the law shall be applied at all

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is not a ministerial, but a legislative act. As this determination was not arrived at by the Supreme Legislature, but was remitted to the discretion of the Lieutenant-Governor, it cannot be said that the Legislature excluded the Cossyah and Jynteeah Hills from the jurisdiction of the High Court; it went no farther than to say that if at any time the Lieutenant-Governor shall think fit to exclude them he may do so. In fact, the Lieutenant-Governor did not avail himself of the power for two years after the passing of the Act, whereas he issued the notification under s. 2 within five months from that time, and it rested entirely with him to determine whether he ever would avail himself of it, and if so, in what district and to what extent. He might possibly have determined only to apply the provisions of s. 5, relating to the public revenue and rent, and of s. 7, as to cesses, in one tract, while he applied the whole law in another. The Supreme Legislature could have no knowledge beforehand of what would be the results of the passing of the Act. It certainly cannot be said that the four hill tracts named in the Act were all in the same condition at the date of the passing of the Act of 1869, so that what was good law for one was necessarily applicable to the others; if this had been so, the frame of the Act would have been different from what it is. If then it was uncertain whether the jurisdiction of this Court in the Cossyah Hills would ever be taken away at all, it cannot be held that it was actually taken away by the Supreme Legislature in the Act of 1869, and that all that was left to the Lieutenant-Governor was to make arrangements accordingly and to fix a date for the commencement of the operation of the Act.

It is consequently necessary to ascertain whether the delegation of power to the Lieutenant-Governor to remove the Cossyah and Jynteeah Hills from the jurisdiction of this Court by a legislative declaration was within the powers of the Legislative Council. On this point, the language of s. 22 of the Councils' Act appears to me to leave no doubt.

Power is given to the Governor-General in Council at meetings for the purpose of making laws and regulations to

alter any laws and make laws for all persons, places, and Courts of justice in the Indian territories of Her Majesty: provided *inter alia*, that such laws shall not in any way affect any of the provisions of the Councils' Act.

The law under consideration is a law made undoubtedly at a meeting of the Legislative Council of the Governor-General, and so far a good law; and if it does not fall within one of the seven exceptions specified in s. 22, it has by the 45th section of 3 & 4 Will. IV, c. 85, all the force and effect of an Act of Parliament; but if it does fall within one of those exceptions, this last-mentioned enactment gives it no force at all. S. 22 of the Councils' Act having been substituted for the earlier provisions on the same subject (3 & 4 Will. IV, c. 85, s. 43, as modified by 16 & 17 Vict., c. 95, s. 23), the words of s. 45—"all laws and regulations made as aforesaid"—only apply to laws properly made under s. 22 of the Councils' Act, and not within one of the exceptions.

The Act of Parliament requires that, ordinarily, all laws shall be made only at a meeting of the Council of the Governor-General held for the sole purpose of making laws and regulations, and at which certain persons are present. When laws are to be made otherwise, there is a specific provision according to the nature of the case, but these exceptional provisions are made by Parliament itself and not left to the discretion of the Indian Legislature; and it is and has long been an established rule (s 70, 3 & 4 Will. IV, c. 85, and s. 6, 24 & 25 Vict., c. 67) that the Governor-General himself shall not by himself, except when specially authorised by Parliament, exercise the power of making laws and regulations. It would not be possible for the Legislative Council validly to divest itself of its own functions and transfer them to the Governor-General alone. A law to such effect made by the Council would violate the provisions of both s. 6 and s. 15, whether that law purported to vest the Governor-General with legislative powers generally or specially, and would, therefore, under the express words of s. 22, be *ultra vires*. But if this is so as to the Governor-General, surely it must be so as to the Lieutenant-Governor of Bengal. The same reasons which apply in the

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one case for restraining the highest officer of the Crown in India from exercising legislative powers alone and for entrusting those powers only to a Council to be exercised at a meeting at which not less than a certain number of members shall be present, must apply with more force to a subordinate officer; and s. 15 is as much violated in one case as in the other.

Therefore, in my opinion, the conferring on the Lieutenant-Governor power to remove the Cossyah Hills from the jurisdiction of this Court was *ultra vires*.

If it was *ultra vires*, this Court is bound to take notice of the fact. The power formerly exercised by the Nizamut Adawlut in this tract of country was given to this Court by Act of Parliament (s. 9, 24 & 25 Vict., c. 104), and unless it has been validly taken away we are bound to exercise it.

No doubt the Governor-General in Council, whatever construction be put on the section referred to, has power to put an end to this Court's jurisdiction in this tract of country, but no other authority in India can do so. But if the Governor-General in Council wishes to do it, he must proceed by the exercise of his legislative powers as created or declared by the Councils' Act, and in no other way. The High Courts' Act provides no new mode of legislation, but makes the jurisdiction of the High Courts subject to the legislative powers of the Governor-General in Council, which must be looked for elsewhere. If he shall proceed in any other way, this Court is constrained by the Act of Parliament to continue the exercise of its jurisdiction.

But it is said that this view of the provisions of s. 22 of the Councils' Act is at variance with that taken through a long course of years, as shown by a series of enactments, in which a somewhat similar mode of supplementing the action of the Legislative Council has been adopted.

I think it unnecessary now to express any opinion as to the validity of the Acts referred to. Assuming them to have been validly enacted, their existence does not support the argument that the mode of legislation adopted in Act XXII of 1869 is only that which has been constantly adopted without objection; and that as it cannot be assumed that this mode of legislation

has escaped the observation of the Imperial Parliament, it has the warrant of a tacit approval.

It appears to me that a distinction must be drawn between provisions by which the carrying out of the declared decisions of the Supreme Legislature is furthered, and provisions which give a power to act independently of the discretion of the Council of the Governor-General. As an example of the one I may take s. 385 of Act VIII of 1859, or s. 445, Act XXV of 1861. These are laws intended to be eventually of universal application in British India (the latter, re-enacted in X of 1872, is now, with very few exceptions, the only law on the subject); the actual introduction of these enactments was in certain tracts of country postponed, and made to depend on the discretion of the Local Government. The Supreme Legislature had considered these laws and adopted them as laws to be eventually in force everywhere; but instead of declaring that they were to take effect everywhere at once, it was content to declare the ultimate law and leave the Local Governments to advance up to this standard as fast as they conveniently could. When a Local Government declared such a law to be in force, it was merely parting with a power of delay conferred upon it; it did not make any law; the law introduced was the law made by the Governor-General in Council with the express intention that it should become the law of the particular tract of country in due time. But Act XXII of 1869 does not stand on precisely the same footing. There was no expression of a determination by or desire of the Legislative Council that eventually the Jynteeah Hills, the Naga Hills, and the Cossyah Hills should be reduced to the same condition as the Garo Hills; at the most it can only be said that there was an expectation that such a measure might become necessary. But an attempt to provide beforehand for the contingency of such a state of things arising in the former as then warranted the introduction of the measure into the Garo Hills, does not amount to a determination that this was the law which it was desirable to put into force in all these hill tracts; had this been the intention of the Legislature, I should have expected it to have been expressed in plain language.

The provisions of s. 39, Act XXIII of 1861, do not affect my view of this matter. This section allows a Local Govern-

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ment, with the previous sanction of the Governor-General in Council, to annex any restriction, limitation, or proviso it may think proper when extending the Code of Civil Procedure to any territory not subject to the general regulations; but this is merely another form of delaying the full extension of the Code. So far as the Code obtains operation, it is still, because the extension is, *pro tanto*, a carrying out of the intention of the superior Legislature that this shall be sooner or later the law in the particular tract of country. As I read the section, no power is given to amend the law itself; it is only a power to keep some portion in abeyance or to make its operation contingent on something external to it, which again is only another form of postponing its full operation.

A very large number of the Acts referred to in the schedule submitted to us of Acts containing delegation of powers is of the same character. The subject of many is limited, but the mode of legislation is substantially the same. The general law on each subject is propounded by the Legislature; the gradual application of it is entrusted to some authority named in the Act. In form, it may be that the law is made for one or more named members of a class with power to extend it to others; but in effect this is making a law for the class with a power granted to the Local Government to introduce it more or less rapidly as may seem fit. The distinctive feature in my opinion is, that in each of these cases the law is constructive by addition to, or remodelling of, the Statute law then existing as to each class of subjects under the directly exercised discretion of a legislative body; whereas Act XXII of 1869, as far as we are now concerned with it, is destructive, and operates merely to terminate the operation of established laws.

There is another class of Acts in which there is apparently a clear delegation of legislative power. I refer to Acts which contain a provision giving power to make rules or bye-laws, and to impose taxes or fix fees and charges; but these are clearly distinguishable from such an Act as Act XXII of 1869, so far as we are concerned with it now, which is only so far as it gives power to the Lieutenant-Governor to repeal s. 9 of 24 & 25 Vict., c. 104. Whether the powers conferred in these Acts to

make rules and bye-laws can in all cases be defended, is a matter I need not discuss. All legislation of this class is subordinate to, and in furtherance of, the defined object of each particular Act.

The case of *Biddle* v. *Tariny Churn Banerjee* (1) at p. 409, and again at p. 479 of the report, is authority for holding that, while the validity of rules which can be brought within the definition of ministerial acts is undoubted, the validity of other rules such as therein mentioned,—namely, rules imposing a penalty directly, or granting power or compelling discovery,—is open to grave doubt, if indeed the case does not go so far as to rule that they are absolutely invalid. It is foreign to my present purpose to discuss that case; it is enough to show that the delegation relied on does not stand unquestioned, but that there is very high authority for doubting its validity. As I have referred to this case, I take the opportunity of observing that it seems to me strongly to support the earliar part of my judgment. At page 406 the learned Chief Justice, Sir Lawrence Peel, observes,—"The Legislature of India, though it possesses large legislative powers, is still a limited Legislature, and exercises a delegated authority of making laws. Independently of the territorial limits assigned to its power of making laws, there are other limits imposed which the Legislature must not exceed; and it is the province of the Courts of justice of the country to decide on the legality of Acts of the Legislature, if a suit be instituted to decide whether the Legislature has or has not exceeded the limits within which it may legislate." Again, at page 479, as I understand the judgment, he assumes as undoubted that delegation of legislative authority by the Indian Legislature is beyond its powers, the question being in each case whether there has or has not been such delegation.

The Acts which are most analogous to the Act under consideration, so far as we have now to deal with it, are few in number; they have been termed deregulationizing Acts.

Act XXI of 1845 was passed while the 3 & 4 Will. IV., c. 85 was in force; the power of legislation was then vested

(1) 1 Tay & Bell, 390.

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in the Governor-General in Council. This Act does not make any transfer of that power, but simply declares that the same authority in which the legislative power rested, *viz.*, the Governor-General in Council, may by order in Council do certain things. The same remarks apply to Acts VI and XI of 1846.

After the passing of 16 & 17 Vict., c. 95, we come to the Sonthal Districts' Act XXXVII of 1855. This differs in form from Act XXII of 1869, and is distinctly a legislative declaration by the Governer-General in Council. The Lieutenant-Governor has, by s. 6, to give effect to it by proclamation; but this obviously is a merely administrative action. The power to allow an appeal in cl. 1, s 4, notwithstanding the declaration in that section that all decisions and sentences passed according to the provisions of the Act are final is a power to relax the stringency of the Act in the direction of the general law.

The Chittagong Hill Tracts' Act XXII of 1860 approaches, in some respects, more nearly to the form of the Act under consideration. Whether any of its provisions are open to question is beyond the scope of my present enquiry. So far as the abolition of the jurisdiction of the Courts of civil and criminal judicature is concerned, the direct and undoubted authority of the Governor-General in Council has been exercised. In the Rohilkhund Act XIV of 1861 there is a slight change of form. While the Supreme Legislature makes a direct declaration in respect of certain tracts specified in the schedule, it gives power to the Lieutenant-Governor, North-Western Provinces, to define the portions of Pergunnas Juspoor and Kashipore in the district of Moradabad, which are to be subject to the Act; but it does not give him power to include these pergunnas or not at his pleasure and at such time as he may think fit. There is no provision for more than one proclamation giving effect to the Act. This Act approaches to, but does not reach, the form of Act XXII of 1869.

Act XXIV of 1864 is wholly different; it validates rules previously made. As far as it empowers the Local Government to extend any Regulation of Act then in force, it may be said to

give legislative power; but this is not such a power as is now in question, and whether such powers have been rightly or wrongly given is a matter on which I express no opinion.

On the whole, then, I am of opinion that the jurisdiction of this Court in the Cossyah and Jynteeah Hills has not been validly taken away, and that we are bound to entertain the appeal.

MACPHERSON, J.— In my opinion the Governor-General in Council has power by legislation to remove from the jurisdiction of this Court a district over which the Court was declared by the Letters Patent to have jurisdiction. That power seems to me to be expressly conferred by s. 9 of 24 & 25 Vict., c. 104,—without which section legislation on the subject would be wholly prohibited by the proviso in 24 & 25 Vict., c. 67, s. 22, that the Governor-General in Council shall not have the power of making any law which shall repeal or in any way affect any of the provisions of that Act or of any Act passed in the same session, or thereafter to be passed, in anywise affecting Her Majesty's Indian territories or the inhabitants thereof.

These two Statutes, 24 & 25 Vict., c. 67 and c. 104, were passed within a few days of each other (one on the 1st of August, and the other on the 6th); and I think it clear that it was intended by ss. 9, 11, and 13 of the later Act to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the proviso, in s. 22 of c. 67, the Governor-General in Council would not have had. A consideration of the terms of the High Court's Act will show that the matters covered by the three sections 9, 11, and 13—in which alone the legislative powers of the Governor-General in Council are saved,—are the only matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. And the express saving of these powers in ss. 11 and 13 was necessary, because those sections relate to matters not included or dealt with in s. 9. The Governor-General in Council has no legislative power in relation to the High Court save what is reserved to him by 24 & 25 Vict., c. 104; and the Letters

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Patent could give no such power not already given by that Statute.

Although I do not doubt that the conclusion arrived at in *Meare's case* (1) was correct, I do not concur in the construction there put upon these two Statutes. I dissent wholly from the theory, which seems to be the basis of the late Chief Justice's decision in *Meare's case* (1), that declaration of jurisdiction contained in the Letters Patent can be affected by legislation by the Governor-General in Council, because the declaration in the Letters Patent is not a "provision of the Act" within the meaning of s. 22. In my opinion it *is* a provision of the Act within the meaning of s. 22, and as such the legislative powers of the Governor-General in Council would be wholly barred in respect of it were those powers not given or reserved to the Governor-General in Council by s. 9 of the High Court's Act. It is only so for as legislative powers are expressly given or reserved by 24 and 25 Vict, c. 104, that the Governor-Ceneral in Council has any legislative authority over the jurisdiction, &c., of the High Court. S. 9, however, does seem to me to give the Governor-General in Council plenary powers of legislation as regards the jurisdiction. For I read that section as declaring that the Court shall have and exercise all such civil and other jurisdiction, original and appellate, and all such powers in relation to the administration of justice in the Presidency, as the Letters Patent shall direct: and save as by the Letters Patent otherwise directed, and subject and without prejudice to the legislative powers of the Governor-General in Council in relation to the matters aforesaid (*i. e*, all the matters mentioned in s. 9, with which the Crown is authorized to deal in the Letters Patent), the Court shall have and exercise all jurisdiction and every power, &c., in any manner vested in the abolished Courts (Supreme and Sudder) of the same Presidency. The section, in short, vested in the new Court all the jurisdictions and all the powers of every description of the two abolished Courts except so far as those jurisdictions and powers might be altered or taken away by

(1) 14 B. L. R., 106.

the Letters Patent or by subsequent legislation by the Governor-General in Council.

This construction of the Statute no doubt leads to the conclusion that the Governor-General in Council has power to alter wholly, and to take away, the jurisdiction of the High Court,—and further, that the Governor-General in Council is the only authority in India by which the jurisdiction or powers of this Court can be altered or in any way affected. Nevertheless, it appears to me to be the right construction : and it is the construction which, as a matter of fact, was invariably put upon the law up to the time of *Meares's case* (1). If it be the right construction, it cannot be questioned that the Governor-General in Council could legally remove the Cossyah and Jynteeah Hills from our jurisdiction.

But it is argued that if the Governor-General in Council had this power, it has not been legally exercised, inasmuch as the Governor-General in Council did not attempt or profess to remove the Cossyah and Jynteeah Hills from the jurisdiction of the High Court, but merely passed an Act authorising the Lieutenant-Governor to remove them if he at any time should think fit to do so. And it is contended that a removal by an order based on the authority thus given to the Lieutenant-Governor of Bengal is not legal.

It is an undeniable fact that the Governor-General in Council did by Act XXII of 1869 empower the Lieutenant-Governor of Bengal at his pleasure to extend the provisions of the Act to the districts in question, and that by virtue of the power so conferred on the Lieutenant-Governor those provisions have since been extended in the manner contemplated.

The first question which here arises is, whether, the Governor-General in Council having passed such an Act, this Court can decline to recognize or be bound by it, on the ground that it was *ultra vires* of the Governor-General in Council to legislate in such a fashion, *i.e.*, to delegate to the Lieutenant-Governor of Bengal functions which were expressly vested in the Governor-General in Council. In considering this matter, it is necessary to go back a little and see what the legislative powers of the Governor-General in Council really are.

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The Statute 3 & 4 Will. IV, c. 85, s. 43, gave the Governor-General in Council power to make laws for repealing or altering any laws or regulations whatever then in force or thereafter to be in force (in British India, &c.), and for all persons of whatever nationality,—and for all Courts of justice whether established by Royal Charter or otherwise, and the jurisdiction thereof,—*save and except* that the Governor-General in Council was not to have power by legislation to repeal or alter any of the provisions of that Act (3 & 4 Will. IV, c 85) or of any Act to be thereafter passed affecting the East India Company or the said territories, or the inhabitants thereof, &c. This power of legislation was (s. 44) subject to the right of the Court of Directors to disallow any law which might have been passed, which was thereupon (*i.e.*, if disallowed) to be repealed. By s. 45 it was enacted,—and this section stands unrepealed to the present day,—that all laws made as aforesaid (*i.e.*, by the Governor-General in Council under the powers given by that Act) "shall be of the same force and effect within and throughout the said territories as any Act of Parliament would or ought to be within the same territories, and shall be taken notice of by all Courts of justice whatsoever within the same territories in the same manner as any public Act of Parliament would and ought to be taken notice of: and it shall not be necessary to register or publish in any Court of justice any laws or regulations made by the said Governor-General in Council."

By the Statute 16 & 17 Vict., c. 95, the Council of the Governor-General for legislative purposes received a new constitution: but the legislative powers of the Council and the effect to be given to its Acts remained as they were under Statute 3 & 4 Will. IV, c. 85.

The Statute 17 & 18 Vict., c. 77, s 3, empowers the Governor-General in Council, with the consent of the Home authorities, from time to time, by proclamation, to take any district under the immediate management of the Governor-General of India in Council, and thereupon to give all necessary orders respecting the administration of such district or otherwise to provide for the administration thereof. But it is expressly

provided that no law or regulation in force in any such district at the time it is so taken under the immediate management of the Governor-General of India in Council shall be altered or repealed except by law or regulation made by the Governor-General of India in Council.

Then came the Indian Councils' Act, 24 & 25 Vict, c. 67, which again gave a fresh constitution to the Council of the Governor-General for making Laws and Regulations. This Act, however, to describe it generally, left the legislative powers of the Governor-General in Council unaltered, save that local Legislatures were re-established and certain matters appertaining more peculiarly to the executive were declared (s. 19) not to be cognizable without the previous sanction of the Governor-General. The legislative power, which was taken away from the Presidencies of Madras and Bombay by 3 & 4 Will. IV, c. 8, was in a modified degree, restored to them; and the establishment of a local Legislature for Bengal was authorised. The legislative powers conferred on the Governor-General in Council by 3 & 4 Will. IV, c. 85, were left unimpaired, but under the new Act, 24 & 25 Vict., c. 67, were to be exercised for the most part in matters of more general administration and such as affected the interests of the Indian Empire at large. In the preamble of the Councils' Act it is merely recited that it is expedient that the provisions of former Acts of Parliament respecting the constitution and functions of the Governor-General in Council should be consolidated, and in certain respects amended. The second section repeals ss. 40, 43, 44, 50, and certain other sections of 3 & 4 Will. IV, c. 85; and it is declared that all other enactments then in force with relation to the Council of the Governor-General of India or to the Councils of the other Presidencies shall continue in force, "save so far as the same are altered by or are repugnant to this Act." S. 22 declares the powers of the Governor-General in Council as regards the subjects of legislation. It is, in truth, a mere re-enactment of the repealed s. 43 of 3 & 4 Will., IV, c. 85, altered formally and with reference to the changes, which were being made in the constitution of the Council. It gives the Governor-General in Council power to repeal or alter

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any existing law of whatever kind, save that it expressly provides that the Governor-General in Council shall not have the power of making laws or regulations which shall repeal or in any way affect any of the provisions of the Act (24 & 25 Vict., c. 67) itself or any of the then unrepealed sections of 3 & 4 Will. IV, c. 85, and 17 & 18 Vict., c. 77, and certain other Statutes named,—and save also that the Governor-General in Council shall not have power to make laws which repeal or affect any provisions of any Act passed in the then present Session of Parliament, or thereafter to be passed, in any wise affecting Her Majesty's Indian territories or the inhabitants thereof.

The 3 & 4 Will. IV, c. 85, remains in force, except so far as it is expressly repealed or is repugnant to the Councils' Act. S. 45 is still unrepealed, though the Councils' Act repeals the two sections immediately preceding and s. 50 which follows it. And there is nothing in s. 45 repugnant to the Councils' Act. Therefore it is clear that s. 45 is still in force, and applies to all laws made by the Governor-General in Council under the Councils' Act. Of course an Act passed by the Governor-General in Council in contravention of s. 22 of 24 & 25 Vict., c. 67, would not be an Act duly passed, the legislative powers of the Governor-General in Council being by that section expressly barred in such cases. But an Act passed by the Governor-General in Council under the Councils' Act, and not falling within any of the prohibitions therein contained, seems, under s. 45 of 3 & 4 Will. IV, c. 85 to have the same effect here as an Act of Parliament would or ought to have; and it must be taken notice of by us in the same manner as any public Act of Parliament. If this be so, this Court has no power to question the authority of the Governor-General in Council, if once satisfied that the Act is not within any of the prohibitions of the Councils' Act. For there is no doubt that, had a public Act of Parliament been passed in the same terms as Act XXII of 1869, we should have been bound to accept it without question.

But, if it be open to me to question the authority of the Governor-General in Council to pass a law which does not fall

within any of the restrictive provisions of 24 & 25 Vict., c. 67, I am unable to say that the Cossyah and Jynteah Hills have not been legally removed from the jurisdiction of the High Court. By s. 4 of the Act the Governor-General in Council did expressly remove the Garo Hills from our jurisdiction, leaving it, however, to the Lieutenant-Governor of Bengal to fix the date from which the removal was to have effect. Then (ss. 5—8) the Governor-General in Council practically left it to the Lieutenant-Governor to provide as he should think fit, for the administration, in all respects of the district, and gave authority to the Lieutenant-Governor to extend to the Garo Hills any law or any portion of any law, then in force in the other territories subject to the Lieutenant-Governor, or which might thereafter be enacted by the Council of the Governor-General, or of the Lieutenant-Governor, for making Laws and Regulations.

As regards the Cossyah and Jynteeah Hills, after, in s 3, repealing Act VI of 1835 (which repeal, it may be noted, did not of itself in any way affect the jurisdiction of the High Court over those Hills), the Governor-General in Council by s. 9 empowered the Lieutenant-Governor from time to time to extend, *mutatis mutandis*, all or any of the provisions contained in the other sections of the Act to the Cossyah and Jynteeah Hills. It is left to the Lieutenant-Governor to say whether these districts shall be removed from the Court's jurisdiction or not,—and also, if removed, what law shall be administered in them. No doubt the whole future position of the Cossyah and Jynteeah Hills is left absolutely to the discretion of the Lieutenant-Governor. For all that is really decided by the Governor-General in Council is, that it is fit and proper that the Cossyah and Jynteeah Hills shall be removed from the jurisdiction of the High Court if the Lieutenant-Governor shall think it right at any time that they shall be so removed. No other matter is actually decided by the Governor-General in Council than that it is right that these districts shall be made over wholly to the Lieutenant-Governor's control, if and when he chooses to take them over. It is impossible to deny that this is practically an entire delegation to the Lieutenant-Governor by the Governor-General in Council of the legislative powers of

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the Council. But on what precise grounds can I say that such delegation is illegal? The Act does not fall within any of the restrictive provisions of the Statute 24 & 25 Vict., c. 67; and there is no positive law which prohibits such delegation. The question is really one of intention,—what powers did the Supreme Legislature intend to confer on the subordinate Legislature, the Council of the Governor-General of India for the purpose of making Laws and Regulations?

Reading the Councils' Act with the High Courts' Act 24 & 25 Vict., c. 104, it is sufficiently clear that the intention of the Supreme Legislature was, that the jurisdiction of the High Court should remain as defined in the Statute, c. 104, except so far as otherwise declared by the Letters Patent or by the legislative enactments of the Governor-General in Council. And it is fairly argued that if the Statutes gave no power of legislation in such matters to any authority in India save the Governor-General in Council, it could not have been the intention that the Governor-General in Council should by legislation confer on the Lieutenant-Governor those powers which it was clearly intended should be exercised by the Governor-General in Council alone. But although I do not doubt that the Governor-General in Council is the only authority in India who can by legislation affect the jurisdiction of this Court, I am not prepared to say that if the Legislative Council of the Governor-General passes an Act declaring that such rules affecting the jurisdiction as the Lieutenant-Governor, may make shall have the effect of law, and if rules affecting the jurisdiction are thereupon made by the Lieutenant-Governor, the alternation of the jurisdiction would be otherwise than by the Governor-General in Council in exercise of his legislative powers For if we hold that the Governor-General in Council must, if the object is to affect the jurisdiction of this Court, do it by the direct act of the Council assembled for the purpose of making laws and regulations, and cannot do it through authority given by that Council to the Lieutenant-Governor or any other functionary, we are in fact legislating and imposing a restriction on the legislative powers of the Governor-General in Council which is not imposed by the Statute.

There are, as I have said, grounds for arguing that the intention was that legislation to affect this Court's jurisdiction should be by the Governor-General in Council directly and not by delegation. On the other hand, the Statute does not expressly say so; and it might have been expected to say so if such had really been the intention, inasmuch as for years prior to the passing of the Statutes of 24 & 25 Vict., powers of legislation had been delegated repeatedly by the Governor-General in Council to the Lieutenant-Governor and other executive officers, and it may be presumed that in framing these Statutes provision would have been made against a repetition of the evil, had it been deemed in fact to be an evil.

Act XXII of 1869 is certainly an exceedingly strong instance of legislation by the Governor-General in Council in a manner amounting to a delegation to the Lieutenant-Governor of Bengal of the legislative powers of the Council. Still powers of a similar nature (though usually not so extensive) have constantly for years past been given by the Governor-General in Council by legislation to various executive authorities. It is very difficult, for example, to distinguish in principle the present case from that of the Civil Procedure Code (Act VIII of 1859), which by s. 385 took effect in any part of the territories not subject to the general regulations only when extended thereto by the Governor-General in (Executive) Council or by the Local Government to which the particular territory happened to be subordinate. In like manner, the first Criminal Procedure Code (XXV of 1861) took effect in Non-Regulation Districts only when extended to them by the Governor-General in (Executive) Council or by the Local Government to which the territory was subordinate. It is substantially neither more nor less than a delegation of legislative authority to say to the Lieutenant-Governor or any other officer,—" Here is a new Code; but it is left wholly to your discretion to decide whether—and if at all, when—it is to be applied to such and such territories now under your government." The principle in these and other such cases is really the same as in the case now before us. Yet, such delegations are frequent.

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Altogether, I do not think that the passing of Act XXII of 1869 was absolutely *ultra vires* of the Governor-General in Council. And after the course of practice which undoubtedly has been followed in this matter for very many years, I should certainly decline to declare such an Act to be beyond the powers of the Governor-General in Council, unless I considered it clear beyond all question that it was so.

I think, therefore, that we have no jurisdiction to entertain this appeal.

Various important points which I have not touched upon have been discussed in the course of the argument. But in the view which I take of the position of the Legislative Council of the Governor-General with reference to this Court, it seems to me unnecessary to go further into them.

PONTIFEX, J.—I concur in the judgment of Mr. Justice Macpherson.

JACKSON, J.—Assenting, as I do, to the decision in *Feda Hossein's case* (1), and being therefore of opinion that the jurisdiction of the High Courts can be affected by legislative action of the Governor-General of India in Council, and by no other authority in this country, I have only to consider whether our jurisdiction has been validly taken away, and whether, if we should think otherwise, we are competent to give effect to our opinions.

It is contended on behalf of the Crown that the jurisdiction of this Court over the Cossyah and Jynteeah Hills was put an end to by a notification of the Lieutenant-Governor of Bengal, dated 14th October 1871, which notification purports to have been issued under the authority of the 9th section of an Act of the Governor-General in Council, called Act XXII of 1869, which received the assent of the Governor-General on the 24th September of that year.

It is further contended that the clause of this Act which empowered the Lieutenant-Governor to issue such proclamation is a law made by the Governor-General in Council under the

(1) I. L. R., 1 Calc., 431.

authority of 24 & 25 Vict., c. 67; that by virtue of clause 45, 3 & 4 Will. IV, c. 85, a law so made is of the same force and effect in India as any Act of Parliament, and that, consequently, neither this nor any other Court in India is competent to inquire into the validity of the Act or to question the mode in which the Legislature carries out its conclusions.

I will address myself first to the latter branch of this argument, and for this purpose it is necessary to state what my opinion is regarding the constitution and powers of the Indian Legislature.

This body is composed of the members of the Executive Government, with the addition of certain persons (not to be less than six or more than twelve in number) nominated by the Governor-General as members of the Council for the purpose of making laws and regulations only. It derives its powers from Parliament and from no other source (see Forsyth's Cases and Opinions on Constitutional Law, page 17; see also 1 Harington's Analysis, Part I, section 1), and those powers are to be exercised in a particular manner and are compassed by certain bounds.

The powers in question, sparingly granted at first, subjected originally, and down to 1834, to the necessity of registration in the Supreme Courts, and thereafter to the inspection and control of both Houses of Parliament, were gradually enlarged by successive regulating Acts, until they reached their present limits. They are now defined by the Statute known as the Indian Councils' Acts, 1861. By that Act the Council, when constituted for legislative purposes, was declared absolutely incapable of transacting any business or entertaining any motion other than the consideration and enactment, or the introduction, of measures of a legislative kind, except that it might amend the rules for the conduct of its business which had been made before it came into existence. The legislative powers committed to the Governor-General in Council are described, and the restrictions on them set forth in the 22nd clause of the Statute.

It was observed during the argument that there is a distinction between the grant of powers which are absolute, except as to matters expressly reserved, and that of powers extending

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only up to certain limits, not beyond; it was contended that the former of these was the description applicable to the powers of the Indian Legislature. It seems to me that the contrary is the case for the following reasons:—The section which defines and guards by various provisos the powers conferred for legislative purposes is thus entitled, "Extent of the powers of the Governor-General in Council to make laws and regulations at such meetings." It is no doubt one of the rules for construing Statutes that no weight is to be allowed to the marginal notes, nor should I refer to this one, but that the powers for like purposes entrusted to Governors in Council are similarly defined in ss. 42 and 43, and such defining clauses are afterwards referred to in s. 48 as provisions *limiting* the power of the Governors in Council.

The powers expressly conferred by s. 22 are—

"Subject to the provisions herein contained to make laws and regulations, for repealing, amending or altering any laws or regulations whatever now in force, or hereafter to be in force, in Indian territories, and to make laws and regulations for all persons, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty."

This language appears to me to contemplate the exertion and exercise of the legislative mind of the Council in relation to the subject-matters indicated, and not to include the enabling of any person or any body of persons to repeal laws at their pleasure, or to make laws for Courts of justice or the like.

But before pursuing this topic further, I return to the question of the competency of this Court to discuss the validity of the Act; and on this point I think that one argument may be derived in favour of the opinion which I hold from the very provision of the Act of Will. IV., on which the advisers of the Crown have placed so much reliance. If we are to interpret the 45th section of that Statute in the way contended for, and the words are given the fullest sense of which they are susceptible, it would be necessary to hold that an Act of the Indian Legislature once passed, whether it observed or transgressed the provisos, would be good and valid until repealed, for the words

of the section are "that *all* laws and regulations made as aforesaid (which means, *vide* s. 44, 'by the said Governor-General in Council made) so long as they shall remain unrepealed shall be of the same force and effect," &c.

Now, it is not contended that a law and regulation made by the Governor-General in Council, forbidding the Secretary of State for borrowing money in England for the service of India, or altering the Mutiny Act, would be valid, or would have any force or effect, and therefore some limitation must be put upon the sweeping terms of s. 45. But it seems manifest that Parliament must have had in mind the possibility and propriety of such laws being questioned on grounds apart from the breach of any of the provisos contained in s. 22.

For s. 24 expressly provides that—

"no law or regulation made by the Governor-General in Council . . . . . shall be deemed invalid by reason only that it affects the prerogative of the Crown."

and s 14 provides that—

"no law or regulation made by the Governor-General in Council *in accordance with the provisions* of this Act shall be deemed invalid by reason only that the proportion of non-official members hereby provided was not complete."

Clearly, therefore, in these cases it was thought necessary to protect the laws in question from being called in question, and the place of question must certainly have been the Courts in this country.

From these premises, therefore,—the limited character of the Legislature, the conspicuous absence of sovereign or even general powers, the Language of the Statute in s. 48, and the provision against challenge on specified grounds,—I deduce the opinion that the Courts in India must have the power of examining the Acts of the Indian legislature for the purpose of inquiring whether they have been made in accordance with the limited (though doubtless extremely large) powers conferred by a Parliament, and also in the manner prescribed by statute; and further, that the effect and force attributed to such Acts by s. 45 of 3 & 4 Will. IV, c. 85, belong only to laws passed under those same conditions.

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But it is further contended that if the Courts have any such power, it can only apply to the provisions touching forbidden subjects, or to those connected with the enacting machinery which are contained in the Statute, and that it cannot extend to criticising the mode in which the Legislature thinks fit to carry out its intentions. If this were so, my answer to the objection would be that, in the case before us, the Legislature has expressed no intention at all, but has merely given anticipative sanctions to any course which the Local Government may at any time think fit to take in reference to a matter as extensive and important as any matter can be. But I think this Court is bound, where its jurisdiction is concerned, and more especially in a matter of criminal jurisdiction, to examine every objection to the validity of an Act, not of course in a captious spirit, remembering indeed that it is under the Legislature, but also that both are the creatures of Parliament.

I have already said that the language of the 22nd clause of the Indian Councils' Act appeared to me not to warrant the handing over to any specified person the power to repeal or to make laws, and it is manifest that such is the effect of s. 9, Act XXII of 1869. It in fact enables an authority quite distinct from the Government of India, in either its legislative or its executive capacity, to abolish if it thinks fit all tribunals and all constituted authorities in a given tract of country, and to do so at any future time, and with reference to a condition of things not even approximately understood by the Legislature. In point of fact, the discretion entrusted to the Lieutenant-Governor was not exercised till more than two years after the passing of the Act—was not exercised at all by the Lieutenant-Governor in office when it was passed, nor even was that Lieutenant-Governor a member of the Council which passed it; for the Act, as is well known, was passed at Simla, where by Statute, the Lieutenant-Governor of the Punjab, and not the Lieutenant-Governor of Bengal, sits in the Indian Legislature.

It seems to me, therefore, clear that the mind of the Governor-General in Council, was not, and could not, have been applied at all, for legislative purposes, to the circumstances of the

Cossyah and Jynteeah Hills in or about October 1871, and that he did not by any law, at that or any other time, take away the jurisdiction of the High Court. The Legislature being competent to take away by a law this Court's jurisdiction, might also, no doubt, by a law declare that at the end of two years such jurisdiction should cease; but it made no such law, and evidently had not made up its mind upon the subject one way or the other.

Bentham, in this Chrestomathia (Vol. VIII, Works, page 94, Note), defines a law as—

"a discourse . . . . . expressive of the *will* of some person or persons to whom, on the occasion and in relation to the subject in question, whether by habit or express engagement, the members of the community to which it is addressed are disposed to pay obedience;"

and he gives a very similar definition elsewhere (Vol. III, p. 215). A regulation can be hardly a less positive or determinate expression of will enforced by sanction. If a *law* includes a declaration that a given person may do, or not do, a particular thing as he chooses, and if the permissive enactment in s. 9, Act XXII, is a lawful exercise of the legislative power conferred on the Governor-General in Council, then it would be equally within that power to enact that it should be competent to the Lieutenant-Governor to abrogate and to re-introduce at his pleasure the whole of the existing law in every part of the Lower Provinces. That, it will doubtless be said, would be a lawful but an absurd and culpable stretch of legislative power; and it ought to be assumed that no such extravagance could emanate from the Governor-General in Council; but in truth the case supposed is not by many degrees removed from the case before us, only the character of such an Act is palpable when applied to our own case, which escapes observation when it refers to a distant and little known object. At any rate, the argument for the Crown is capable of being pushed to the most dangerous lengths; and if the case appeared to me only doubtful, I should think it more reasonable to conclude that Parliament had not intended to allow a latitude which might, though it presumably would not, be so abused.

But there are other reasons which, as I think, point with equal plainness to the same conclusion. Parliament itself seems

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to have commented on this matter, in some places indirectly, in others directly.

The 25th section of the Indian Councils' Act recites that it has been doubted whether the Government of India had the power of making rules or laws for the Non-Regulation Provinces otherwise than by way of formal legislation; and it then proceeds to validate all such rules or laws made prior to the passing of this Act. Now, irrespectively of what seems to me the unmistakable provision in favour of past rules only, it occurs to me to ask why, if the powers of the Indian Legislature have as wide an extent as is claimed for them, resort was had to the authority of Parliament in this matter? Why should not the Governor-General in Council have passed an Act legalizing such rules of previous date, and permitting them for the future. It was, it seems to me, because its powers were considered unequal to that strain, and because Parliament, in legalising the past, thought it not right to sanction the practice in the future.

Somewhat similar measure of those powers is presented by the enactment of the Statute 34 & 35 Vict., c. 34, which, it seems to me, in the view contended for on the part of the Crown, would have been at least in part superfluous.

These declarations of the British Parliament seem to me on the one hand to indicate a distinct view as to the powers of the Indian Legislature, and on the other an equally distinct determination that every relaxing of the strict rule as to the form of legislation should emanate from itself. In short, it seems to be clear that, after the passing of the Indian Councils' Act down to 1870, all legislation for every part of British India was required to be by laws passed at a meeting for making laws and regulations. That undoubtedly was, and probably continues to be, the opinion of Sir Henry Maine, for it is plainly so stated in a paper of his written in 1868, which he has published as an appendix to his work on Village Communities. And on this point I think myself justified in referring to the despatch of Sir Charles Wood in transmitting a copy of the Indian Councils' Act to Lord Canning's Government. I am aware that there is high authority against such references

and also of the danger in some instances of making them, but the despatch is in this instance to be used against the Crown, whose Minister Sir Charles Wood then was; and I believe there is no reason whatever for supposing that the Secretary of State was not on that occasion a perfectly faithful interpreter of the meaning of Parliament, or that the decision of Parliament, in this particular was at all other than what the Ministry intended it to be. Sir C. Wood says in paragraph 27 of the despatch (written in August 1861)—"You will observe, however, that henceforth legislative measures affecting any of the territories, regulation or non-regulation, under the dominion of Her Majesty at the date of the passing of the Act, must be passed either by the Council of the Governor-General, or by that of the Government to which such territories may be subject." It would be, I think, a very imperfect and unreal compliance with that injunction, if the Governor-General in Council contented himself with a legislative declaration that the local Executive might in a given locality do anything that pleased it.

But further, as in regard to some of these provinces, a more convenient and flexible procedure was found to be requisite; and as the remedy was in the hands of Parliament, a further Act was passed in 1870 (33 Vict., c. 3), wherein it was declared to be expedient that provision should be made to enable the Governor-General of India in Council to make regulations for the peace and good government of certain territories in India otherwise than at meetings for the purpose of making laws and regulations; and provision was made accordingly. It cannot have been intended that there should be in existence, simultaneously, two methods of changing the law for such territories, and I should, therefore, consider that for this reason alone the course taken under the Act of 1869, about a year and a half after the passing of the Statute just mentioned, was bad; but I also think it in plain contravention of the Indian Councils' Act.

As to the nature and extent of the legislative powers intended to be conferred on the Indian Government (it is really that) by the Indian Councils' Act, any one who desires to observe how differently Parliament works when it gives complete authority,

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reserving only its own supreme and paramount rights, need only compare that Act with the Statute 30 Vict., c. 3, constituting the Dominion of Canada with its superior and subordinate Legislatures.

One argument, however, which was much relied on, I must not leave unnoticed, although I do not deal very fully with it. Our attention was drawn to a great number of instances in which, beginning from 1844-45, and coming down to the present time, a power had been exercised more or less analogous to that used in the present instance; and with reference to these enactments it was contended, *first*, that a long course of legislation of the permissive or delegatory kind must be taken to have established the practice and therefore the authority of that course; and *secondly*, that inasmuch as many of such enactments were anterior to the Indian Councils' Act, Parliament must be taken to have noticed the course of practice, and by passing it over in silence to have sanctioned what it observed. As to this it seems to me in the first place that the great majority of the Acts named in the list handed up to us differ so widely from the present one as to be of little value for the purpose of the argument. It often happens, and must often happen, that the usurpation of a power passes unnoticed, or at least unchallenged when the occasion is insignificant, or when the attendant circumstances appear to justify or to excuse the encroachment. To leave to an inferior or a different authority the provision of means for carrying out a law, or to entrust to its discretion the choice of a precise date for putting it in force, appears to me not incompatible with the retention by the Legislature in its own hands of the principal decision as to the policy of the law; and many of the Acts referred to go no further than this trifling delegation. Speaking without any claim to precision, because I have not thought myself bound to go through the list, I venture to affirm that not more than two or three of these instances can be at all classed in importance, and in departure, as I view it, from the statutory powers of the Government of India to legislate, with the present one. And as the questioning of such assumptions of powers is matter of accident not originating with the Courts, no argu-

ment can be founded on their having hitherto passed unnoticed by the Judges. With Parliament of course the case is widely different. The sovereign Legislature intervenes when and as it pleases of its own motion or impelled thereto from outside; and if any consent could be inferred from the silence of Parliament, the Courts would be concluded. But on such a topic as this I do not think that we are bound to presume the knowledge of Parliament, or that it would be safe to draw so important an inference from its silence. It cannot be said that the practice under consideration has ever been free from doubts as to its legality. Judicial doubts on the subject were expressed in the case of *Biddle* v. *Tariney Churn Banerjee* (1), to the decision in which case, so far as it went, we are bound to pay, the highest respect; and we may feel tolerably certain that if the matter had attracted the attention of Parliament, it would have been dealt with in a manner similar to that adopted in the 25th section of the Indian Councils' Act, that is to say, the doubts would have been recited and the practice legalized either for the past or for all time.

I am unable, therefore, to assume even that Parliament was cognizant of, still less that it intended by silence to approve, the mode of legislation referred to.

Upon these considerations it seems to me that the notification of the Lieutenant-Governor issued under authority of Act XXII of 1869, s. 9, could not have the effect of putting an end to the jurisdiction of the High Court. I take it as clear that this Court had jurisdiction in the Cossyah and Jynteeah Hills, because that was a jurisdiction vested in the Court of Nizamut Adawlut at the time of its abolition; and the result is that, *me judice*, such jurisdiction has not been validly taken away, but still exists.

I wish now to say that when I first committed to writing the views which I held upon this very important question, I found myself to have arrived, by a nearly similar train of reasoning, at the same opinion which my brother Markby has expressed with a fulness of treatment and an amplitude of research to

(1) 1 Tay. & Bell, 390.

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which I do not pretend. I might have adopted, perhaps, every word of that exhaustive judgment, but I thought it on the whole more respectful to the Government, as well as more satisfactory to myself, that I should indicate, however slightly, the grounds of my own independent conclusion.

GARTH, C.J.—The important questions which we have to decide in this case have now been maturely and anxiously considered by this Court; and although I regret for some reasons the decision at which the majority of the Court have arrived, it is satisfactory to know that the points have been argued as fully as they could have been; and that our attention has been called, as I believe it has, to all the available materials, which could guide our minds to a just conclusion.

The case has been twice argued,—first by the Legal Remembrancer on behalf of the Government of Bengal; and again, at the instance of the Government of India, by the Advocate-General and the Standing Counsel, Mr. Kennedy, for the Crown and by Mr. Phillips on behalf of the prisoners, whose services the Government have very properly retained for that purpose.

Upon the first point which we have to determine, there is little or no difference of opinion. We are all agreed that the Governor-General in Council could, in the exercise of his legislative powers, have removed the district of the Cossyah and Jynteeah Hills from the jurisdiction of the High Court.

The only question is, whether by the means which they have adopted, they have effectually carried out that object.

The jurisdiction of the Court has certainly not in this instance been taken away by any *direct action* of the legislative body. Act XXII of 1869 did not of itself even profess to take away that jurisdiction. It can only be said to have done so *indirectly*, by conferring upon the Lieutenant-Governor of Bengal what was undoubtedly a very large discretionary power. He was by that Act invested with authority to remove the district in question from the jurisdiction of the High Court, and to abolish entirely at his own discretion and at his own time the laws and the system of judicature which prevailed there. He had also the power of introducing new laws, and of

reconstituting a judicial system in accordance with his own views; or he might, if he had so pleased, have left the district entirely destitute of any laws, or any judicial system whatever.

It may indeed be open to grave doubt, whether, looking only to the Statutes from which the Legislature of India derive their powers, it was contemplated by Parliament that they should exercise those powers by conferring on any other person, or body of person, so large a discretion.

But the question which we have to decide, is, not whether in this instance the Legislature have exercised their powers wisely, or in such a way as Parliament intended that they should exercise them; but—

1*st*.—Whether they had the power to take away the jurisdiction of the Court by the means which they adopted? and

2*ndly*.—Whether that is a question which the Courts of this country have a right to determine?

It will be convenient to deal first with the last of these points.

It was argued at the bar that the power of making laws and regulations which was given to the Legislature of this country by the Councils' Act was as extensive a power (subject to the restrictions contained in s. 22), as was possessed by the Imperial Legislature; and that any enactment which they were pleased to pass under the name of a law could be no more questioned by the Courts than an Act of Parliament. But it seems to me that a great and dangerous fallacy underlies this argument; because there may be many enactments which the Indian Legislature may pass, and honestly believe that they have a right to pass, but which may, nevertheless, be *ultra vires*, and of no force at all as laws. Suppose, for example, that an Act were passed, which in point of fact infringed one of the restrictions in s. 22, but which the Legislature *bonâ fide* believed was no infringement: would the belief of the Legislature that they were justified in passing such an Act prohibit Courts of justice from inquiring into the validity of it? Or to take another instance unconnected with the restrictions in s. 22: suppose the Legislature

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were to pass an Act, by which they authorized certain police officers to arrest a French subject in Chandernagore, and upon the man being arrested in Chandernagore, and brought in custody to Calcutta, he were to institute a suit here for illegal imprisonment,—would the Courts here have no jurisdiction to enquire into the legality of the imprisonment, and would the prisoner be utterly without remedy, simply because the Government had passed the Act, and believed that they had a right to pass it as a law? These instances are of course very clear; but in others considerable doubt might arise as to whether an Act passed by the Legislature was or was not within their powers; and in all such cases, unless Courts of law had jurisdiction to determine this question, the Indian public would have no means of redress, and the Government here would be virtually autocratic.

It may be said, no doubt, that the right which Her Majesty in Council possesses of putting a veto on any Act which is passed by the Legislature, affords some security against any excess of their powers; but it must be borné in mind that the scrutiny to which Indian measures are subjected by Her Majesty in Council is not so much a legal security for the purpose of ascertaining whether the Act is or is not strictly within the powers of the Legislature, as a scrutiny of policy and prudence to determine whether the Act is in accordance with the views of the Home Government, and a wise and prudent measure, having regard to the interests of the Empire.

I am, therefore, of opinion that it is the province and duty of this Court to determine whether by the Act of 1869, and the notification in the *Gazette*, which was made in accordance with its provisions, the jurisdiction of this Court has been abolished; and that it is not because that Act has been passed by the Legislature as a law that we are disabled from inquiring into its validity.

No doubt, as soon as the fact is once established, that an Act of the Legislature which has been duly passed is within the scope of their powers, the Court have no right to inquire into the propriety or wisdom of the law which is established by that Act; but it is not every Act which the Legislature may

pass which can legally be considered as a law. Thus to bring the argument nearer home to our present purpose, suppose the Legislature were to pass an Act, transferring the whole of their legislative powers over the Indian Empire to the Governor-General. That, in my opinion, would not be a law at all within the meaning of the Statute. It would simply be an abdication of their legislative powers in favour of the Governor-General, directly at variance with the language and plain meaning of the Councils' Act; and I should say the same of a similar transfer of their powers with regard to any portion of the Indian Empire.

Now I consider that the question in the present case is, whether that portion of the Act of 1869 which relates to the Cossyah Hills is a law properly so called, or a mere transfer of the powers of the Legislature to the Lieutenant-Governor of Bengal.

I quite agree with my learned brothers that this is a question of construction, and one to be determined not only by reference to Councils' Act itself, but to other Acts of the Imperial Legislature which may be found to have a bearing upon the subject, and to other important considerations, to which I shall presently refer.

If the Act of 1869 stood alone, as the only instance of its class, and we had only to determine whether the transfer of power to the Lieutenant-Governor which is thereby made was such a law as the Councils' Act authorized, I confess I should feel more doubt upon the question. But having regard to the course and character of the legislation which has been going on in this country, and in England with reference to this country, for the last forty years, it appears to me that the Imperial Legislature have themselves put a construction upon the Councils' Act (which so long as it is not inconsistent with the language of the Act itself) we are bound in duty to adopt, however much it may be opposed to our first impressions; and I quite think also that every reasonable intendment, which can legally be made by this Court in favour of the validity of the acts of Legislature should undoubtedly be made.

Now, upon looking back through the Acts of Council since the year 1833, when the East India Company's Charter Act

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was passed, it seems to me impossible to resist the conclusion that the principle and the course of action which has constantly been pursued by the Legislature of this country is precisely that which is now called in question in the Act of 1869.

By the Act of 1833 the legislative powers which were then conferred upon the Governor-General in Council were in the same language, and for the purposes of the present case) to the same effect, as those given by the Councils' Act in 1861; and from the time when that Act passed, the Governor-General in Council has constantly been in the habit of exercising those powers through the instrumentality of high officials and public bodies, in whom a large discretion has been vested for that purpose; and when we consider the extent and variety of the business of the Legislature, it is difficult to see how without such machinery they could effectually discharge their functions.

It would seem almost impossible in a country like British India, so vast in extent, so various in its population, its laws, and its customs, that the Legislature could perform its multifarious duties satisfactorily, without entrusting to the executive Government, to the Governors of provinces, or to other high officials, and representative bodies, a considerable share in the working out of their manifold and comprehensive measures; and it would also seem impossible that they should do this effectually without vesting in those high personages and bodies a large amount of discretionary power.

Moreover, it must be borne in mind that whatever important trusts are thus created by the Legislature, they are by no means absolute or irrevocable. Her Majesty in Council can put a veto upon any Act of the Governor-General in Council which her advisers may not approve, and the Government here are always in a position to see how the powers, which they have conferred are being exercised, and if they are exercised injudiciously, or otherwise than in accordance with their intentions, or if, having been exercised, the result is in any degree inconvenient, they can always by another Act recall their powers, or rectify the inconvenience. Now, it will be sufficient for my present purpose that I should refer to a few only of the Acts of

Council which were passed by the Legislature, between 1833, the year of the East Indian Charter, and the passing of the Councils' Act in the year 1861; and I would refer in the first place to the Procedure Codes of 1859 and 1861 as being remarkable instances of the course of action to which I have alluded.

The Civil Procedure Code of 1859, which effected a great change in the law, was only applied in the first instance to the Regulation Provinces of Bengal, Madras, and Bombay; and under the provisions of s. 385, it was not to take effect in any other parts of India, until it should be extended thereto by the Governor-General in Council, or by the Local Government of any Non-Regulation territory. Thus the Lieutenant-Governors of Non-Regulation Provinces were empowered at their own discretion, and at their own time, to extend, each to his own territory, the provisions of a Statute, which not only introduced an entirely new procedure into the Civil Courts, but contained enactments which affected very materially the rights, liberties, and property of the subject; and by Act XXIII of 1861 (which was passed in the same year as the Councils' Act) the Local Governments of Non-Regulation Provinces were invested with a much larger discretion; because they were by that Act authorized to introduce the same Code into their respective provinces, subject to such *restrictions, limitations, and provisos* as they might think proper.

Then again, by Act XXV of 1861, the Criminal Procedure Code, a similar power was given to certain Local Governments for introducing at their own option the provisions of that Code into their respective territories; and this Act not only introduced new modes of procedure, but contained many enactments which made a very material change in the criminal law.

It seems to me impossible to deny that these Acts did in fact confer upon the Local Governments of Non-Regulation Provinces precisely the same kind of power, although different in degree, as by the Act of 1869 was vested in the Lieutenant-Governor of Bengal; they placed entirely in the hands of the Local Government of those Provinces the right of abolishing at their pleasure the old system of procedure, and of introducing a new system, which very materially changed the law, and

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affected the rights and liberties of the inhabitants of those Provinces. And the Civil Procedure Code of 1861 went further, because it gave the Local Governments a power to alter or modify the Code in any way they might think proper, and so to introduce a different law into their respective Provinces from that which was in force in the Regulation Provinces.

And there were many other Acts passed during the period which I have defined, in which the Legislature proceeded upon the same principle, although the powers conferred by those Acts might not have been so extensive as in the two instances which I have just named. Thus, Act II of 1835 gave the Bengal Government full power to issue any instructions which it might think proper for the control and guidance of the Courts of Assam and Cachar. Act VI of 1835 contained similar provisions with regard to the Courts in the Cossyah Hills. Act XXI of 1845 authorised the Governor-General in his executive capacity to place any of certain specified territories under a totally different system of law from that to which they were then subject. Act IX of 1846 empowered the Madras Government to make laws for the regulation of the Madras Harbour. Act XVI of 1846 conferred upon certain Commissioners the right of making bye-laws for the town of Calcutta. Act XI of 1848 gave the same Commissioners still larger powers of a similar kind. Act I of 1852 empowered the Bombay Government to make laws for the regulation of the Bombay Harbour. Act XXII of 1860 affords a more striking illustration of the same principle. By that Act the Chittagong Hill Tracts were entirely excluded from the jurisdiction of the ordinary Courts, both civil and criminal, and from the control of the revenue laws and officers; and they were placed entirely in the hands of the Lieutenant-Governor of Bengal, who was to appoint what Courts and officers he thought proper, and give what instructions he pleased for the governance of such Courts and officers And again, Act XIV of 1861 contained similar provisions with regard to the Rohilcund Hill Tracts: placing the administration of justice and the management of the revenue in the hands of the Lieutenant-Governor of the North-West Provinces.

Now all these Acts amount in one sense to a transfer of legislative power, because in each of them the Legislature entrusts to some other person or body of persons the making of laws and regulations which it might have made itself. Thus, instead of making laws for the regulation of the harbours of Madras and Bombay, it has transferred the power of making those laws to the Local Governments. Instead of introducing the Procedure Codes into the Non-Regulation Provinces, it has left the introduction of those Codes to the discretion of the Local Governments. Instead of organizing a system of judicature and revenue laws for outlying districts, such as Assam and the Chittagong and Rohilcund Hill Tracts, it has transferred to the Local Government the duty of making laws for these districts.

The difference between the transfer of authority in all these cases and in that which we are now called upon to decide, appears to me one of degree only, not of principle; and if Courts of justice had to determine in each of such cases how far the Legislature might or might not go in the creation of these important trusts, and in conferring powers upon high officials, which they might have exercised themselves, the task would not only be one of extreme difficulty, but must lead in my opinion to most inconvenient results.

Has then the Legislature of this country been proceeding all these years upon a principle unwarranted by law? Has it been abdicating its proper functions and transferring powers which it had no right to transfer? The answer to this question will be found in the Councils' Act of 1861. That Act has put a construction upon the meaning of the Indian Charter of 1833 which it seems to me almost impossible to misunderstand.

It cannot seriously be supposed that the Imperial Parliament, when it was reconstituting and strengthening the Legislative Council in 1861, conferring upon it fresh powers, and subjecting it to restrictions which had not been previously imposed, could have been in ignorance of the mode in which the powers of legislation, which had existed for nearly thirty years, had been exercised by the Governor-General in Council. The Acts of thate Lgislature had been regularly transmitted to England

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for the approval of Her Majesty in Council. They were well known to the authorities at the India House. They had been considered by Her Majesty's advisers; and many of them, more especially the Procedure Codes, had been carefully discussed and considered both in England and in this country. The Act of 1859 was prepared and passed under the auspices of Sir Barnes Peacock; and the Acts of 1861 were also passed at the time when he was not only Chief Justice of the High Court but also a Member of Council.

It cannot be supposed therefore, that if the provisions of those Acts had been contrary to law or even questionable, they would have escaped the vigilance of Sir Barnes Peacock, whose keen perceptions and long experience both as a legislator and as a judge, rendered him peculiarly capable of detecting any such illegality. Nor, on the other hand, can it be supposed, that the Imperial Parliament would have renewed in the Councils' Act of 1861 the legislative powers which the Governor-General in Council had so long exercised, if they had disapproved of the course of action which the Legislature had been pursuing. The fact that with the knowledge of the circumstances which they must be assumed to have possessed, Parliament did in the Councils' Act renew the powers which were given by the Act of 1833, appears to me to amount to a statutory acknowledgment that the course of action which had been pursued by the legislature in the exercise of those powers was one which the Act had authorized.

As regards the case of *Biddle* v. *Tariney Churn Banerjee* (1), which has been relied upon by Mr. Justice Markby, I need only say that, although I entertain the greatest respect for the learned Judges who took part in that decision, I cannot help considering that the view which they took in that case of the powers of the Legislature has been since virtually disregarded by the Legislature itself, and overruled by the Imperial Parliament by the construction which they have put upon the Act of 1833. I believe that at the time when that case was decided, it was generally supposed that the power of the Legislature to

(1) Tay. & Bell, 390.

transfer its authority was very limited. If that case were now law to the full extent of the decision, it would follow that a great many Acts of the legislature which have been acted upon as law for years past, and are acted upon now, were altogether illegal.

I am, therefore, of opinion that Act XXII of 1869, the principle of which I cannot distinguish from that of the Acts which I have mentioned, was a law which the legislature were justified in passing, and which did, in conjunction with the notification which was made under it, effectually remove the districts in question from the jurisdiction of the High Court. But as the majority of the Court are of a contrary opinion, the appeal made by the prisoners will be entertained, and the records will be sent for.

It is much to be desired that this adverse judgment, and the vast importance of the question which it involves, may induce the Government of India to take this case, if it is open to them to do so, on appeal to the Privy Council.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

GOBIND CHUNDER KOONDOO AND OTHERS (PLAINTIFFS) v. TARUCK CHUNDER BOSE AND OTHERS (DEFENDANTS).*

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Sept. 12.

Res-judicata—Act VIII of 1859, *s.* 2—*Suit for Rent.*

The plaintiffs brought this suit to establish, as against the defendants, their title to certain land in the occupation of a tenant. In a previous suit instituted by one of the present defendants against the tenant for rent, one of the present plaintiffs (representing the right now claimed by all of them) intervened as a defendant, on the ground that he was the person entitled to the rent, and failed to establish his claim. *Held,* following the Full Bench case

* Special Appeal, No 794 of 1876, against a decree of Baboo Srinath Roy, Subordinate Judge of Zilla Furreedpore, dated the 14th of February, 1876, affirming a decree of Baboo Unnoda Nath Mozoomdar, Officiating Munsif of Bhunga, dated the 6th July, 1875.

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of *Hurri Sunkur Mookerjee v. Muktaram Patro* (1), that the plaintiffs in this suit were barred by the judgment in the former suit.

When once it is made clear that the self-same right and title is, substantially in issue in two suits, the precise form in which either suit was brought or the fact that the plaintiff in the one case was the defendant in the other became immaterial.

THIS case was referred to a Full Bench by Garth, C. J., and Mitter, J., by the following order:—

"This was a suit brought by the plaintiffs to recover possession of a one-anna share of a certain jote. In the year 1871, the plaintiffs claimed to be entitled to a 15-anna share of the said jote, and the defendant No. 1 to a one-anna share thereof. In that year the superior landlord of the jote sued some persons other than the defendant No. 1 for rent of the entire jote, and obtained a decree against them, under which the said tenure was put up for sale, and purchased by the defendant No. 4, who again sold the same share to all the plaintiffs in the name of the plaintiff No. 1. The defendant No. 1 then brought a suit (No. 1174 of 1872) for arrears of rent of the one-anna share against the occupying tenant of the jote, Mohun Chunder Dass, in which suit the plaintiff No. 1 intervened as a defendant, upon the ground that he, and not the present defendant No. 1, was entitled to the rent claimed. Thereupon the question was raised in that suit, whether the then plaintiff (the defendant No. 1), or the then defendant (the present plaintiff No. 1) was entitled to the rent as owner of the one-anna share; and that question was adjudicated upon and decided against the present plaintiff. The intervening defendant in that case (the present plaintiff No. 1), claimed to be the owner of the entire jote, by virtue of the said sale to him on behalf of all the present plaintiffs; and the only question in this suit is, whether the plaintiffs (by virtue of that sale) are the owners of the one-anna share of the jote as against the defendant No. 1, the plaintiff in the former suit?

"Both the lower Courts have held that the plaintiffs are barred by the judgment in the former suit (by virtue of

(1) 15 B. L. R., 238, S. C., 24 W. R., 154.

s. 2, Act VIII of 1859), upon the ground that the self-same question which was there raised and decided is also raised in this suit.

"The question has now come before us on special appeal, and as there appear to be conflicting decisions of this Court upon it,—see *Mussamut Inderbuttee Kooer* v. *Shaikh Muhboob Ali* (1), *Mohima Chunder Mozoomdar* v. *Asradha Dossee* (2), *Deokee Nundun Roy* v. *Kali Pershad* (3),—and as the point is one of general importance, we think it right to refer the question to a Full Bench.

"The question is, whether, under the circumstances stated, the plaintiffs are barred by the judgment in the former suit?"

Baboo *Obhoy Churn Bose* for the appellants.

Baboo *Bungshidhur Sen* for the respondents.

The following cases were referred to in the course of argument:—*Mussamut Inderbuttee Kooer* v. *Shaikh Muhboob Ali* (1), *Mohima Chunder Mozoomdar* v. *Asradha Dossee* (2), *Deokee Nundun Roy* v. *Kalee Pershad* (3), *Dhonaye Mundul* v. *Arif Mundul* (4), *Shib Pershad Panah* v. *Muddun Mohun Doss* (5), *Aukhil Chunder Mookerjee* v. *Shib Narain Ghose* (6).

The judgment of the Full Bench was delivered by

GARTH, C. J.—I am of opinion that in this case the plaintiffs are barred by the former judgment. It is to be observed that the present suit is not to recover khas possession of the property in question. The land is in the occupation of a tenant, and the plaintiffs' only object is to establish their title to it as against the defendant No. 1. We have, therefore, to see whether the right and title which is the subject of claim in this suit was not the very same right and title which was in issue between the same parties, and determined in the former suit. When once it is made clear that the self-same right and

(1) 24 W. R., 44.
(2) 15 B. L. R., 251 note; S. C., 21 W. R., 207.
(3) 8 W. R., 366.
(4) 9 W. R., 306.
(5) 15 W. R., 415.
(6) *Id.*, 527.

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title was substantially in issue in both suits, the precise form in which the suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

Now, in this instance, the plaintiff in the former suit is the same person as the defendant No. 1 in this; and he sued to recover from the occupying tenant the rent of the property now in dispute. In that suit one of the plaintiffs (representing and claiming the same right under the same title which is now claimed by all the plaintiffs) intervened as a defendant, and he resisted the then plaintiff's claim to the rent, upon the ground that he (representing the present plaintiffs' interest) was entitled to it as the owner of the property. An issue was, accordingly, framed in that suit, as to whether the then plaintiff (the present defendant No. 1) was entitled to the rent as owner of the property in question as against the then defendant who represented the present plaintiffs. This question was contested between them in that suit upon the same title and materials which are now brought forward in the present suit, and the only difference is, that the plaintiff in that suit is the defendant in this.

On the other hand, it is argued by the appellant, that the claim in the former suit was for rent against the tenant; that the only issue in that case was whether the plaintiff was entitled to that rent, and that the question of title raised by the intervening defendant was only incidental to the main issue. But as between the plaintiff and the intervening defendant the question, and the only question, was that of title, and as the defendant in that suit chose to intervene and to raise that question between himself and the plaintiff, he, and those whom he represented, must take the consequences of their intervention.

Our decision in this case will be found entirely in accordance with the views expressed by the Full Bench in the case of *Hurri Sunkur Mookerjee* v. *Muktaram Patro* (1).

The appeal will be dismissed with costs.

(1) 15 B. L. R., 238; S. C., 24 W. R., 154.

ORIGINAL CIVIL.

Before Mr. Justice Kennedy.

JUGOMOHAN HALDAR *v.* SARODAMOYEE DOSSEE.

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July 27. and August 27.

Hindu Law—Partition—Share of Mother on Partition among Sons—Deceased Son.

On a partition among her sons, a mother is entitled to obtain a share as representative of deceased son, as well as one in her own right.

SUIT for partition of a house and premises, 32, Anundram Doss's Street in Calcutta. One Jayakrishna Halder died in 1835 intestate leaving a widow, the defendant Sarodamoyee, and five sons, the defendant Krishnamohan, Gopimohan and Harimohan since deceased, the defendant Rajonimohan, and the plaintiff. At the time of his death he was entitled to a fourth share in certain property, of which the house and premises in suit formed part, and of which he and his three brothers had been in joint possession. After Jayakrishna's death, namely in 1846, a partition of the joint property was come to, and on such partition the house and premises in suit were allotted to the representatives of Jayakrishna, who since had lived as a joint Hindu family subject to the Dayabhaga law. Harimohan, one of the sons died in 1848 unmarried and intestate, and his mother Sarodamoyee succeeded to his share of the property as his heiress and representative. Gopimohan, another of the sons, died in 1855 intestate, leaving his widow, the defendant Soudamini Dossee his heiress and representative. The suit was brought by Jugomohan, one of the sons, against Sarodamoyee, Krishnamohan, Soudamini Dossee, and Rajonimohan, for a partition of the property. The plaintiff submitted that, as one of the five sons of Jayakrishna, he was, subject to the share to be allotted to Sarodamoyee as mother of the said five sons as aforesaid, entitled to one equal fifth share in the said house and premises, and that the said house and premises ought to be divided into six equal parts, of which one ought to be allotted to him in severalty; but that provision ought to be made for the partition and division of the share to be allotted to Sarodamoyee between the persons entitled thereto at her death. After hearing

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evidence, a decree was made for partition. The only question material to this report was as to the portion to be allotted to Sarodamoyee,—namely, whether she was entitled both to her own share and the share of her deceased son Harimohan.

Mr. *Bonnerjee* and Mr. *Stokoe* for the plaintiff.

Mr. *Jackson* and Mr. *J. G. Apcar* for the defendant Krishnamohan.

The other defendants did not appear.

KENNEDY, J.—In this case it seems that I have omitted to give judgment on a question as to the right of a mother on partition amongst her sons to obtain a share as representative of a deceased son, as well as a share in her own right. This question was reserved at the conclusion of the judgment, and I thought I had already delivered judgment upon it, but I had certainly considered the question and come clearly to the conclusion that she is so entitled.

The Dayabhaga, Chap. III, s. II, para. 31, says—"The equal participation of the mother with the brother takes effect if no separate property has been given to the woman, but if any has been given she takes half a share." I do not think that the share which a mother takes as representing her deceased son is separate property which has been given to her. The Sanskrit of this text I find in the Vyavastha, 1st edition, page 420, to be স্ত্রীধনাদানে, which Baboo Shama Churn translates, I presume correctly, স্বামি প্রভৃতি স্ত্রী ধনদাদিলে, "on the husband and the rest not giving stridhan." There is, therefore, no exception for protperty possessed by the wife save in the case of stridhan, and under the Bengal school of law and the Bengal decisions on the Mitakshara, inherited property is not stridhan, whatever controversy there may be under the other schools or in other treatises; see *Chotay Lall* v. *Chunnoo Lall* (1). Even, therefore, if the words আদান have not the precise force of gifts expanded by the

(1) 14 B. L. R., 235, at p. 244.

Bengali gloss into gifts by the husband and the rest, I think that this could not be looked upon as coming within the exception.

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Attorney for the plaintiff: Mr. *Gillanders*.

Attorney for the defendant Krishnamohan: Baboo *P. C. Mookerjee*.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

LUNGESSUR KOOER (PLAINTIFF) *v.* SOOKHA OJHA (DEFENDANT)*

AND

RADHAY KISHAN (PLAINTIFF) *v.* KALI MISSER (DEFENDANT).†

1877 *July* 19.

Jurisdiction—Rent Suit under Rs. 100—*Special Appeal—Beng. Act VIII of* 1869, *ss.* 33, 34, 102—*Act VIII of* 1859, *s.* 372.

Held by the Court (JACKSON, J., dissenting), that no appeal lies to the High Court from the decision of a District Judge in a suit for rent under Rs. 100, when no question of right to enhance or vary the rent of a ryot or tenant, nor any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment.

THESE two cases were referred for the opinion of a Full Bench by JACKSON and WHITE, JJ.

The referring order in Special Appeal 1026 was as follows:—

JACKSON, J.—This is an appeal against a judgment of the District Judge of Sarun made on appeal against an original judgment of the Munsif of Chumparun in a suit brought

* Special Appeal, No. 1026 of 1876, against a decree of E. Drummond Esq., Judge of Zilla Sarun, dated the 13th of March, 1876, reversing a decree, of Baboo Matadin, Munsif of Chumparun, dated the 18th of December 1875.

† Special Appeal, No. 2362 of 1876, against a decree of E. Gray, Esq., Officiating Judge of Zilla Patna, dated the 29th of July, 1876, affirming a decree of Baboo Nepal Chunder Bose, Second Munsif of Patna, dated the 16th of December, 1875.

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by the plaintiff for recovery of Rs. 52 and 9 annas principal with interest, being arrears of rents. The Judge having reversed the decision of the Munsif, the plaintiff comes before us on special appeal, and objection is taken on behalf of the respondent that, under the provisions of s. 102 of Beng. Act VIII of 1869, no second appeal to this Court will lie, the suit being a suit for rent in which no question "of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto," has been determined by the judgment. This section will, undoubtedly, apply, and inasmuch as the judgment under consideration is one which, unless restricted by any provision of law, we should certainly reverse, it is impossible to avoid considering the question whether the special appeal is in fact taken away by the section referred to. The pleader for the respondent having submitted his objection has not thought fit to support it by any argument, and has left it to us to dispose of without any assistance from him.

This matter is not new, because, unquestionably, numbers of appeals to this Court have been dismissed on this ground, the Division Benches before which the appeals came having considered the section a valid bar to a special appeal. As at present advised, I myself and my brother White are both of us inclined to think that the section does not take away the appeal to this Court. But, as the contrary opinion has been repeatedly acted upon by this Court, we are bound to refer the case to a Full Bench, and as the matter will be fully argued there, it is only necessary to state briefly the reasons which make us think that the appeal is not taken away by the section in question.

The authority of this Court to entertain special appeals, and the right of suitors to prefer such appeals, is provided for by s. 372 of the Civil Procedure Code, which provides that "a special appeal shall lie to the Sudder Court from all decisions passed in regular appeals by the Courts subordinate to the Sudder Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of

the case upon the merits." The Court which heard the regular appeal in the case now before us is the Court of the District Judge, which is unquestionably a Court subordinate to the High Court; and, therefore, a special appeal will lie unless any law for the time being in force provided otherwise. The provision relied on as taking away the special appeal is s. 102 of Beng. Act VIII of 1869. Now that section does not, in express terms, take away this power of appeal, for it says:—"Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has not been determined by the judgment."

I am clear that the special appeal given generally by s. 372 of Act VIII of 1859 cannot be taken away by implication, but only by express provisions restricting the general right; and even if we were of opinion that the Bengal Legislature intended to take away any right of special appeal, the question would arise whether that Legislature, under the powers conferred on it by the Statute of 1861, could take away the jurisdiction of this Court.

Now, in the very important case lately decided by this Court—*Queen* v. *Burah and Book Singh* (1)—it was, I think, conceded on behalf of the Crown, and assumed in the judgments delivered by the learned Judges, that the only authority which could take away the jurisdiction of the High Court was with the Governor-General in Council.

It was suggested by the vakeel for the appellant in this case that the class of suits to which this appeal belongs is a special class relating to special subjects, and that it was the creation of the Bengal Legislature; and that, therefore, the right of appeal would not exist unless it was expressly provided for by the Legislature which created it.

Suits for rent have been within the cognizance of Courts in

(1) *Ante*, p. 63.

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British India ever since, I believe, the foundation of that empire, and between the years 1799 and 1859, subject to a double jurisdiction,—that is to say, to the Court of the Collector, and then by a sort of appeal, to the Civil Court. By the Act of 1859, the double jurisdiction was abolished, and then suits for rent became cognizable by the Revenue Courts alone. But the Act (X) of 1859 made the orders of the Revenue Courts and also of the District Courts subordinate to them, subject to final appeal to the Sudder Court; and this Court, when established, undoubtedly inherited the jurisdiction of the Sudder Court. The effect of the later enactment, Beng. Act VIII of 1869, has been to throw rent suits into the great mass of litigation cognizable by the Civil Courts under the first section of the Civil Procedure Code. The present suit, therefore, being cognizable by the Civil Courts, and being heard in appeal by a Court subordinate to the High Court, there is, I apprehend, nothing in s. 102 of the Beng. Act to take away the right of appeal, and such right can only be restricted by competent legislative authority.

This view is not new to me. I have often considered it, and in the case of *Brojo Misser* v. *Ahladi Misrani* (1) these doubts were intimated in these words in my separate judgment: "For these reasons I think that whatever exemption from appeal is conferred by that section is limited to the decisions of District Judges." In saying that I left myself free for the future consideration of this question.

For these reasons I think that the efficacy of s. 102 ought to be referred for the decision of a Full Bench.

Special Appeal No. 2362 was a similar case in which the suit was for a sum below Rs. 100; and an objection was taken that no appeal would lie, and it was ordered that it should be referred to the Full Bench with Special Appeal No. 1026.

The two accordingly came together before the Full Bench.

In Special Appeal No. 1026:—

Baboo *Sreenath Banerjee* for the appellant.

Baboo *Doorga Pershad* for the respondent.

(1) 13 B. L. R., 376; S C., 21 W. R., 320.

In Special Appeal No 2362:—

Baboo *Amorendronath Chatterjee* for the appellant.

Baboos *Kally Mohun Doss* and *Boodh Sein Singh* for the respondent.

The argument in the first case only is given. The question being in the nature of a preliminary objection to the hearing of the appeal, the respondent began.

Baboo *Doorga Pershad* for the respondent.—The principal question in this case is, whether, under Beng. Act VIII of 1869, s. 102, the High Court has power to hear appeals in the class of cases to which that section refers. Under s. 153 of the previous Act (X of 1859) such suits were cognizable only in the Revenue Courts, and the decision of the Collector was final. Before Act X of 1859 there was an appeal to the High Court, but by that Act the legislature took away the jurisdiction of the High Court in rent cases, and gave exclusive jurisdiction to the Revenue Courts. Under s. 153 of Act X of 1859, there was no appeal to the Civil Courts including in those the High Court. S. 160 of that Act points out the cases in which an appeal would lie. The provisions of s. 102 of Beng. Act VIII of 1869 are similar to those of s. 153 of Act X of 1859, and as there was no appeal under the old Act, there can be none under the new one. [JACKSON, J.—The Civil Courts get jurisdiction in these cases by the removal of Act X of 1859, and s. 1 of Act VIII of 1859 takes effect.] S. 33 of Beng. Act VIII of 1869 provides, that all suits brought for any cause of action arising under Act X of 1859 and Beng. Act VI of 1862, shall, from and after the commencement of the Act, be cognizable by the Civil Courts according to their several jurisdictions. The jurisdiction given here is a jurisdiction to try suits according to the Code of Civil Procedure, except where it is otherwise provided by the Act.—*Poorno Chunder Roy* v. *Kristo Chunder Singh* (1); and there

(1) 23 W. R., 171.

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being other provisions in the Act as to rent suits, this appeal does not lie. [MACPHERSON, J.—Why don't you argue that the recent Full Bench case of *Brojo Misser* v. *Ahladi Misrani* (1) decided the whole question ?] S. 34 of Beng. Act VIII of 1869 provides that, "save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein, shall be regulated by the Code of Civil Procedure." If this section had stood alone, it might be argued that rent suits were included; but s. 102 was enacted at the same time, and it is not necessary to have an express separate enactment in order to take away jurisdiction. Ss. 34 and 102 should be construed together. The first portion of s. 102 refers to the state of the law before the passing of the Act. Then neither the High Court, nor the District Court, had power to hear appeals in rent cases. Now the District Judge can hear an appeal in a rent suit, but the High Court cannot.

Baboo *Sreenath Banerjee* for the appellant.—With regard to the case of *Brojo Misser* v. *Ahladi Misrani* (1) the point now before the Court was not decided. [MACPHERSON, J.—Mr. *Rochfort* raised it in argument.] S. 102 of Beng. Act VIII of 1869 does not remove any power of hearing special appeals vested in the Court under s. 372 of Act VIII of 1859. Nothing is to be deemed to confer a power of appeal where there is no express enactment, and equally nothing is to be deemed to deprive the Court of the power of hearing appeals given by a Statute; the only way by which an existing statutory right of appeal can be taken away is by an express enactment. In ordinary civil suits the Court has jurisdiction to hear special appeals, and as s. 34 of Beng. Act VIII of 1869 does not affect that power, this appeal must lie. The real difficulty is, whether ss. 102 and 34 of Beng. Act VIII of 1869 being read together deprive the Court of the power of hearing special appeals. If suitors have a right, they cannot lose it by a wrong construction put upon an Act. The power that the Court has is not expressly taken away, and cannot be impliedly taken away.

(1) 13 B. L. R., 376, S. C, 21 W. R., 320.

The Cossyah and Jynteeah Hills case—*Queen* v. *Burah and Book Singh* (1)—decides that Acts of the Bengal Council cannot affect the jurisdiction of the High Court. The High Court derives its powers from the Charter granted by virtue of the Statute 24 and 25 Vict., c. 104. S. 9 of that Statute gives the Court jurisdiction and powers subject to restriction by the Letters Patent and the Acts of the Legislative Council. Therefore, the Bengal Council cannot pass any Act restraining the powers conferred by the Charter—*Reg.* v. *Reay* (2); *The Queen* v. *Meares* (3). Act VIII of 1859 and the old Rent Act were passed in the same year, and s. 23 of the Rent Act provided that rent suits should be cognizable in the Courts of the Collectors of land revenue and in no other Courts. Beng. Act VIII of 1869 removed the bar to rent suits being brought in Civil Courts, and there being no express provision against an appeal to this Court, this Court must have jurisdiction.

Baboo *Doorga Pershad* in reply.

The following judgments were delivered by the Full Bench:—

JACKSON, J.—In answering on my part the question referred to the Full Bench, I have little to add to the reasons which I gave in referring this case. Those reasons, to my thinking, have not been answered. It is suggested that the question raised here has been virtually decided by a long course of practice, and also by the ruling of the Full Bench in the case of *Brojo Misser* v. *Ahladi Misrani* (4); and that we ought not, whatever our view might have been, if the question were now raised for the first time, to disturb such a course of practice. It seems to me that, although it is extremely desirable to maintain a long settled ruling in regard to matters in which the security of titles depends, or even where to arrive at a contrary decision would disturb the practice of inferior Courts, it is not necessary to do so in the present instance, where no man's title can be affected, nor can any possible inconvenience arise by the mere admission of the present appeal. It seems to

(1) *Ante*, p. 63.
(2) 7 Bom. H. C. Rep., Cr. Ca., 6.
(3) 11 B L. R., 106.
(4) 13 B. L. R., 376; S C, 21 W.R.,320.

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me that, in the first place, the question has not been expressly raised and decided by a Full Bench ; 2ndly, that if, as I think, the law allows an appeal, we are not competent to deprive the appellant of his right merely out of deference to the practice of the Court ; and 3rdly, that to persist in an error, merely because that mistake has been committed for seven years, is a course in which I am not prepared to concur. I would admit this special appeal.

MACPHERSON, J.—In my opinion the questions which have been referred to us are concluded by the uniform course of the decisions of this Court ever since Beng. Act VIII of 1869 came into force, and cannot now be re-opened. Many thousands of suits under this Act have been disposed of annually, and this Court has never, in any one of the numerous appeals which have come before it in these suits, doubted the power of the Bengal Council to pass the Act. If the uniform course of our decisions during these many years is wrong, it seems to me that it is a matter for the legislature, and that it is too late for us now for the first time to say that the Act was made without jurisdiction in so far as it touches the High Court as regards the right of appeal or otherwise.

As to the particular issue arising on s. 102, it seems to me also to be concluded by the numerous decisions of the Court (1) (all taking the same view of the law) ending with the Full Bench case of *Brojo Misser* (2), which was heard in March, 1874. The question in that case was, whether an Additional Judge was a District Judge within the meaning of s. 102. The majority of the Court held that he was, and therefore that, under that section, no appeal lay. Mr. Justice Jackson held that he was not, and therefore that the appeal did lie. But the report of that case does not show that any of the Judges doubted the effect to be given to s. 102, or conceived that, in cases falling within that section, there could be any appeal from the decision of the District Judge.

(1) See for example 18 W. R., 102 ; 23 W. R., 117. *per* Macpherson, J., 8 B. L. R. 180 and 188 ; 10 B. L. R., 2 13 B. L. R., 3;6 ; S. C. Ap., 29 and 30 ; 13 B. L. R,, 377 ; and 21 W. R., 320.

I consider that the matter referred to us has already been settled by these cases.

MARKBY, J.—I concur in the judgment of Mr. Justice Macpherson.

AINSLIE, J.—By 24 and 25 Vict., c. 104, s. 9. the High Court is vested with all powers and authorities that may be conferred on it by Her Majesty's Letters Patent, and subject to the legislative control of the Governor-General in Council, with all the then existing powers of the Sudder Dewani Adawlut.

By s. 15 of the Letters Patent of 1862, this Court was constituted a Court of appeal from the Courts from which there was then an appeal to the Sudder Dewani Adawlut, and was directed to exercise jurisdiction in such cases as were then subject to appeal to the Sudder Dewani Adawlut by virtue of any existing law, or which might thereafter be made subject to appeal by any law or regulation made by the Governor-General in Council.

By s. 16 of the Letters Patent of 1865, this Court is constituted a Court of appeal from all Courts subject to its superintendence, and directed to exercise appellate jurisdiction in such cases as were then (in 1865) subject to appeal to it by virtue of any law or regulation then in force.

In 1861, 1862, and 1865 alike, there was at least one class of suits in which the Sudder Dewani Adawlut or the High Court had no power to interfere on special appeal,—namely, the class of rents suit falling within the provisions of s. 153, Act X of 1859. This Court neither inherited a power to interfere in such suits from the Sudder Dewani Adawlut, which had not got it, nor took it as a new power under the first or second Letters Patent.

The words of the first Charter "in such cases as are subject to appeal to the said Court of Sudder Dewani Adawlut" distinctly limit the appellate power of this Court.

Under the second Charter it can only be held, that it gives a power of dealing in appeal with the class of cases now under consideration, if it was given by the laws in force in 1865. The general law of appeal was s. 23, Act XXIII of 1861; but

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this general law was rendered inoperative in certain cases by s. 153, Act X of 1859, and as by this law there was no first appeal in certain cases, the special appeal section (372, Act VIII of 1859) had nothing to operate upon.

By s. 33, Beng. Act VIII of 1869 the jurisdiction of the Collectorate Courts was brought to an end, and all suits theretofore triable in such Courts were made triable by the ordinary Civil Courts; and by the next section it was provided that the procedure was to be regulated by the Code of Civil Procedure save as in this Act might be otherwise provided. The 102nd section is one of those sections in which a different procedure is provided; and therefore, unless s. 34 can be got rid of there can be no special appeal.

It seems to me that s. 372, Act VIII, 1859, does not override s. 34, Beng. Act VIII, 1869. In order to introduce s. 372, Act VIII, 1859, it must be held that the provisions of s. 153, Act X, 1859, were based on the constitution of the Court from whose judgment the appeal was taken away, and not the character of the suits in which it was forbidden. Such a view seems to me to be distinctly negatived by s. 27, Act XXIII, 1861, as to which there can be no doubt that the character of the suit is the foundation of the law.

But if the limitation of appeals established by s. 153, Act X, 1859, of the Governor-General in Council, affected suits, and was not in respect of Courts, then s. 372 is as much qualified by s. 153, Act X of 1859, as it admittedly is by s. 271, Act XXIII, 1861, and the change of form introduced by Act VIII of 1869 has not the effect of removing the qualification. S. 34, Act VIII of 1869, as carried out by s. 102, left the jurisdiction of this Court intact, and is, therefore, not open to the objection that no legislative power except that of the Governor-General in Council can alter the jurisdiction of this Court.

If I entertained any doubt on the subject, I should feel bound by the long established and never-before questioned (as far as I know) practice of the Court.

GARTH, C. J.—But for the long course of practice which has prevailed in this Court since the year 1869, and the Full Bench

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decision in the case of *Brojo Misser* v. *Ahladi Misrani* (1), I should have been disposed to hold with Mr. Justice Jackson that a special appeal lay in a case like the present. But I think it so extremely important that the rules of law prescribed by this Court should be settled and uniform, that I am unwilling to disturb a course of practice which, as it seems to me, has been confirmed by a Full Bench decision.

It is true that in that case the point now before us was not directly argued, because apparently it was not considered arguable; but the decision of it appears to me to have been involved in the Full Bench judgment, because the Court there held that, under circumstances similar to the present, a special appeal does not lie from an Additional Judge to this Court any more than from a District Judge. That ruling does, in my opinion, virtually determine the question now referred to us. The special appeal will, therefore, in conformity with the judgment of the majority of the Court, be dismissed with costs.

PRIVY COUNCIL.

P. C.*
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April 17 & 18.

FORESTER AND OTHERS (PLAINTIFFS) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).

[On appeal and cross appeal from the Chief Court of the Punjab.]

Execution—Privy Council Order awarding Costs—Interest on Costs—Act XXIII of 1861, *ss.* 10 *and* 11.

Where an order passed by Her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court which has to execute the order to direct payment of the costs with interest.

The principle of the decisions in cases arising under ss. 10 and 11 of Act XXIII of 1861, which have established a similar rule of practice in executing decrees passed by the Courts in India, approved.

Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order.

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

(1) 13 B. L. R., 376; S. C., 21 W. R., 320.

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THIS was an appeal, with a cross appeal, against a decree of the Chief Court of the Punjab, dated the 17th April, 1875 passed in execution of an order of Her Majesty in Council, dated the 5th February, 1873.

The order in question was passed in a suit in which the representatives of the late Mr. Dyce Sombre sought to recover the value of certain arms which had been seized in the year 1836 by the Government of India on the death of Begum Sumroo. This suit was originally brought in the year 1848 in the Court of the Zilla Judge of Delhi, by whom it was dismissed with costs in the following year as barred by limitation, his decision being affirmed by the Sudder Court of Agra in the year 1850. These decisions were, however, reversed on appeal to the Judicial Committee of the Privy Council, who, by an order passed in February, 1858, remanded the case for trial on the merits, and at the same time directed that the costs of the suit, so far as they had been occasioned by the improper plea of limitation, should be paid to the plaintiffs by the defendant.

This order was only partially carried out, so far as the direction as to costs was concerned; the costs which had been incurred in the Appellate Court were paid, but the costs incurred in the Court of the first instance were not paid. The case was, however, tried on the merits; and finally came up again to the Judicial Committee on appeal, who, on the 5th February, 1873, after reversing the decision of the lower Courts on the merits, directed that the amount of the costs of the appellants in all the Courts in India be paid to the appellants in India by the respondent.

In execution of this order, the Chief Court of the Punjab passed the order under appeal, by which they awarded to the plaintiffs the whole of the costs incurred by them in the course of the first hearing in the Zilla Court of Delhi, and in the course of the hearing on the merits in the Deputy Commissioner's Court at Delhi, in the Commissioner's Court at Hissar, and in the Chief Court of the Punjab, but without interest; and also directed the refund of the sum of Rs. 1,014, paid by the plaintiffs, as the defendant's costs in the Zilla Court of Delhi, with

interest thereon at 12 per cent. per annum, from the 11th September, 1849, the date when it was paid.

The main question raised by the present appeal was as to whether the Chief Court of the Punjab was right in refusing interest on the plaintiffs' costs. In the cross appeal objection was taken to interest being awarded on the refund of the sum of Rs. 1,014, the defendant's costs, and to the plaintiffs being allowed any portion of the costs incurred in the Zilla Court of Delhi at the original hearing, except the stamp-fee then paid on the institution of their suit.

Objection was also taken to the date from which interest had been allowed by the Chief Court on the sum of Rs. 5,309.

Mr. *Leith*, Q. C., and Mr. *Doyne* for the appellants.—The order of Her Majesty in Council received effect under the decree of the Chief Court. The Chief Court, in making that decree, was to be governed by the practice of the Indian Courts, which is to allow interest on costs. Costs carry interest in the Indian Courts without any special order, unless the contrary be expressed; See Macpherson's Civil Procedure, 5th edition, p. 232; *Digamburee Dabee* v. *Nundgopal Baneryee* (1), *Harradhun Sandyal* v. *Rashmonee Dassia* (2), *Singh* v. *Lalla Kalee Churn* (3). [SIR B. PEACOCK.—If there is no direction in the order in Council as to interest, can the Court below award it? Here there is no indication of an intention that the Court below should have any discretion to award interest.] According to the practice in India, a Court executing a decree can award interest although the Court passing the decree has made no order on the point; see *Beer Chunder Joobraj* v. *Ram Coomar Dhur* (4). [SIR J. COLVILE.—Have you any cases to show what the practice of the Indian Courts has been in dealing with an order of the Privy Council giving costs, but saying nothing as to interest?] I have no case exactly in point, but the decision in *Rajah Lelanund Singh* v. *Maharajah Luckmissur Singh Bahadoor* (5) is in *pari materia*. There the plaintiff sued

(1) 1 W. R., Mis., 1. (2) 2 W. R., Mis., 21. (3) 3 W. R., Mis., 21.

(4) 6 W. R., Mis., 26. (5) 13 Moore's I. A., 490.

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for possession of lands and for mesne profits. The Privy Council, in remitting the cases, ordered that the Court below should direct possession to be given to the plaintiff. The Court below gave possession, but refused to order mesne profits, on the ground that the Privy Council had given no order in respect of these. It was held by the Privy Council on appeal, that the order in Council directing possession to be given carried by its own force the right to mesne profits. [SIR J. COLVILE.—In that case this Committee did not make any decree, but only a declaration as to the rights of the parties, leaving it to the lower Court to work them out. Here the decree is complete and final.] The practice of the Indian Courts to allow interest on costs continued up to a recent period; but is alleged to have been altered in consequence of the decision of a Full Bench of the Calcutta Court in the case of *Mosoodun Lall* v. *Bheekaree Singh* (1). The decision in that case seems rather to conflict with the view taken by the Privy Council in the case last cited, and it may be doubted whether it is a correct exposition of s. 11, Act XXIII of 1861. But assuming it to be correct, it does not touch the question of interest on costs, but only decides that interest shall not be allowed in execution on the principal debt, where it is not expressly given by the decree. The later cases of *Rajah Leelanund Singh* v. *Maharajah Joy Mungul Singh* (2) and *Maharanee Brojo Soonduree Debia* v. *Anund Moyee Debia* (3) fail to notice this distinction. [SIR M. SMITH.—The practice of the Courts should be uniform. Interest on costs can be on no different footing from interest on the principal debt.] We rely on the views expressed by the Privy Council in the case of *Rajah Lelanund Singh* v. *Maharajah Luchmissur Singh Bahadoor* (4).

As to the time from which interest on costs should be reckoned, it was reasonable that it should run from the time when the costs were actually incurred. [SIR J. COLVILE.—When the decree of a Court of first instance is reversed by

(1) B. L. R., Sup. Vol., 602.
(2) 15 W. R., 335.
(3) 16 W. R., 302.
(4) 13 Moore's I. A., 490.

a Court of appeal with costs and interest, the Court in taxing costs does not direct that interest shall run from two dates, from the date of the decree in the lower Court in respect of the costs incurred in that Court, and from the date of the decree in the appeal in respect of the costs incurred by the appeal.] We contend that the order of an Appellate Court reversing the judgment of a lower Court should restore the successful appellant to the position he would have been in had he succeeded at first in the lower Court.

Mr. *J. D. Mayne* for the Secretary of State.—The order of Her Majesty in Council does not award interest on costs, and the Punjab Court cannot go beyond that order. Whatever may have been the former practice, it is now settled law that the Courts in India in dealing with decrees of the Courts of that country could not award interest in execution not provided for by the decree; see the decision of the Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai* (1). There is no difference in this respect between a decree of an Indian Court and an order of Her Majesty in Council. The cases of *Rajah Leelanund Singh* v. *Maharajah Joy Mungul Singh* (2) and *Maharanee Brojo Soonduree Debia* v. *Anund Moyee Debia* (3) related to such orders. In these cases and in *Lekhraj Roy* v. *Mahtab Chand* (4) and in *Gooroo Doss Roy* v. *Stephens* (5), it was held that, where the order in Council was silent as to interest on costs, the Court of execution could not award it. The same course had been followed by the High Court of the N.-W. Provinces in *Bhoza Rughbur Singh* v. *Bhoza Raj Singh* (6), in which the Court distinguished the case of *Rajah Lelanund Singh* v. *Maharajah Luckmissur Singh Bahadoor* (7), on the ground that in that case no final decree had been prepared by the Privy Council, the proceedings being merely remitted to the High Court with certain directions

(1) 15 B. L. R., 383, S. C., L. R., 2 Ind. Ap, 219.
(2) 15 W. R., 335.
(3) 16 W. R., 302.
(4) 21 W. R, 147.
(5) 13 B. L. R., Ap., 44; S. C., 21 W. R., 195.
(6) 3 All. H. C. Rep. (1871), 319.
(7) 13 Moore's I. A., 490.

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as to the decree to be made. In the Madras High Court also it had been decided that it is not competent to a Court executing a decree to add to it by giving interest; see *Kuppa Ayyar* v. *Venkataramana Ayyar* (1), where the reasons are well given.

But assuming that the Chief Court of the Punjab could have awarded interest, it certainly could not have done so from the time for which the appellants contend. Had the order in Council awarded interest on costs, the interest would have run from the date of the order, not from the date of the reversed judgments of the lower Courts. Under the Statute 1 and 2 Vict., c. 110, s. 17, interest runs, in the Courts in England, on costs forming part of a judgment as well as on the principal debt, but only from the date of entering up judgment: *Pitcher* v. *Roberts* (2). As to the time when judgment is to be considered as having been entered up, see *Fisher* v. *Dudding* (3), *Newton* v. *Grand Junction Railway Company* (4).

By our cross appeal we object to the decree of the Chief Court in so far as it orders us to pay Rs. 1,273, being the plaintiffs' costs in the Zilla Court of Delhi, and to refund with interest the sum of Rs. 1,014, the defendant's costs in that Court paid by the plaintiffs. These items were recoverable under the order in Council passed in February 1858, and had already been made the subject of proceedings in the Courts of the Deputy Commissioner and of the Commissioner of Delhi. The latter had refused to allow the plaintiffs' application as not made within time. As to the time within which the orders of Her Majesty in Council should be executed, see *Kristo Kinkur Ghose Roy* v. *Burroda Caunt Singh Roy* (5), in which the view of the Full Bench in *Annandamuyi Dasi* v. *Purna Chandra Roy* (6), that the right to enforce the order of Her Majesty in Council is not affected by any law of limitation, was not assented to. [SIR M. SMITH.—The order in Council is not always a decree. The lower Court

(1) 3 Mad. H C Rep., 421
(2) 2 Dowl, N. S, 394
(3) 3 M & G., 238
(4) 16 M & W, 139
(5) 14 Moore's I A., 465, S. C., 10 B L R, 101
(6) B L R, Sup Vol., 506, S. C., 6 W R., Mis., 69.

may have to give the decree which the order directs. Time will then run from the date when the lower Court gives the decree. Sir B. Peacock referred to Mr. Macpherson's Practice of the Privy Council, 2nd edition, pp. 149, 150.] We say the claim was barred under Part II, s. 5, cls. 1 and 2 of the Punjab Code. The Commissioner of Delhi, moreover, having so decided in 1865, the matter is *res judicata*.

The Chief Court was wrong in granting interest on refund of costs; see *Rodger* v. *The Comptoir d' Escompte de Paris* (1), where the point is expressly decided. There was also an error in the date from which interest had been reckoned by the Chief Court on the refund of Rs. 5,309.

Mr. *Leith* in reply admitted the error pointed out. It should have been corrected in the Court below, but might be corrected at any stage. The defendant had expressly agreed to be bound by the decision of the Chief Court as to whether the refund of the costs received by him should be with interest, and was bound by that agreement—*Sadasiva Pillai* v. *Ramalinga Pillai* (2). The order in Council of 1873 gave the plaintiffs a right to recover their costs in the Zilla Court of Delhi, although their remedy under the order in Council of 1858 might be gone.

At the close of the argument their Lordships' judgment was delivered by

SIR J. W. COLVILE.—These appeals arise out of proceedings taken in the Chief Court of the Punjab to give effect to an order of Her Majesty in Council, made on the 5th day of February 1873. That order was designed to determine finally a litigation which had subsisted for a great many years, first between the committee of the late Mr. Dyce Sombre, and, after the death of that gentleman, between his representatives and the Government of India, touching the liability of the Government for a seizure of certain arms and military stores effected upon the death of the Begum Sumroo. It was a pecu-

(1) 7 Moore's P. C. C., N. S., 314.

(2) 15 B L. R., 383, S. C., L. R., 2 Ind. Ap., 219.

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liar order, because, after reversing the decisions of the Indian Courts declaring the seizure to have been wrongful, and ascertaining the value of the arms and munitions of war, and the amount of the damages to be paid by the defendant to the plaintiffs, it proceeded, with the consent of the counsel on both sides, to direct payment of that sum to be made in this country, leaving nothing to be carried out in India except the final direction as to costs, which was, "that the costs of the appellants in the Chief Court of the Punjab, and in the Court of the Commissioner at Hissar, and in the Court of the Deputy Commissioner of Delhi, be taxed and ascertained by the proper officers of those Courts respectively, and that the amount of the costs of the appellants in all the Courts in India be paid to the appellants in India by the respondent."

After various proceedings had in the Chief Court of the Punjab, the order under appeal was made. The following are the material passages in it: "The costs taxed and ascertained to have been incurred in India by the plaintiffs, appellants, which shall be payable by the defendant, respondent, amount, as per memorandum at foot, to Rs. 12,354-12-0, but no interest is allowed on such costs;" and "the Court further orders and decrees that the defendant shall refund to the plaintiffs the sum of Rs. 1,014, with interest thereon from the 11th September 1849, to date of payment, at the rate of 12 per cent. per annum; and a further sum of rupees 5,309, with interest thereon from the 4th August 1865, to date of payment, at the rate of 12 per cent. per annum."

Against this order the appeal and the cross appeal have been brought. The appeal of the plaintiffs is in effect that interest ought to have been allowed upon the 12,354 rupees 12 annas in a certain way. The Judges of the Chief Court of the Punjab had held that, in executing the order of Her Majesty in Council, they were not at liberty to give any interest upon the costs, because the order contained no direction for the payment of interest in respect of such costs; and it may further be observed that the mode in which the plaintiffs in the Court below sought to have the interest which they claimed computed was a very peculiar one. They asked to have the

gross principal amount of the plaintiffs' costs, viz., the 12,354 rupees 12 annas, divided into four sums, and to have interest computed on each of such sums from the date of the decree of the Court wherein the costs which is represented had been incurred. So far as their Lordships are aware, there is no instance of such a course having been adopted,—certainly none has been brought before them during the somewhat lengthy argument which has taken place upon these appeals. The Committee that made the report to Her Majesty upon which the order in Council was made, if it had intended to place, by means of some such direction, the parties in the situation in which it considered they would have stood if everything had been done rightly in the lower Courts, would of course have been competent to do so; but that a subordinate Court executing an order in Council, which is silent upon interest, is at liberty to interpolate such a very special direction into that order, is a proposition which seems to their Lordships to be wholly unsustainable. It is not necessary for their Lordships to consider from what other date interest should be calculated, because they are of opinion that the Chief Court of the Punjab is right in its conclusion—that where the order in Council is silent as to interest upon the costs decreed, the Judge of the Indian Court which has to execute the decree has no power to direct payment of those costs with interest.

The learned counsel for the appellants relied upon what they said had been the course of practice in India. In determining what is the existing practice in India, their Lordships think they ought first to consider what are the statutory provisions which govern the present procedure of the Courts in India. Those which are material to the present question are to be found in the 10th and 11th sections of Act XXIII of 1861. The words of the 10th section are: "When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum, adjudged from the date of suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit, with further interest on the aggregate sum so adjudged, and on the costs of

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the suit from the date of the decree to the date of payment." This clause seems to give the Courts a discretionary power to allow interest on costs, rather than to make it imperative upon them to do so. The learned counsel for the plaintiffs, however, relied on certain decisions of the High Court of Bengal, which they said established that an order for costs necessarily implied that the party in whose favour they were decreed might take out execution for them with interest from the date of the decree to the date of payment. It appears, however, that the more recent and authoritative decisions upon the 11th section of Act XXIII of 1861 are the other way. It is sufficient to mention the case of *Mosoodun Lall* v. *Bheekaree Singh* (1), which was a decision of the Full Bench of the High Court of Bengal; and that of *Kuppa Ayyar* v. *Venkata Ramana Ayyar* (2) before Mr. Justice Bittleston in the Madras High Court. Those cases seem to have established as to decrees of the Indian Courts that the Judges of the subordinate Courts executing those decrees have no right to allow interest unless the decree which is to be executed has specifically directed the allowance of that interest. It was said that these cases, or some of them, related to the principal monies decreed, or to mesne profits; but so far from there being any authority in favour of a distinction between those and costs, the case of *Rodger* v. *The Comptoir d'Escompte de Paris* (3), is an authority for the proposition that a claim for interest on costs in that respect is less favoured than a claim for interest on the principal money decreed. Since the before-mentioned cases have been determined as to the practice of the Courts of India and the powers of the Judges executing decrees of those Courts, the power of a subordinate Court executing an order of Her Majesty in Council has also been considered in the two cases cited from the Weekly Reporter (4), in which judgment was given by Mr. Justice Mitter; and it appears, that as to orders in Council, as well as to decrees of the Indian Courts,

(1) B. L. R., Sup. Vol., 602.
(2) 3 Mad. H. C. Rep., 421.
(3) 7 Moore's P. C. C., N. S., 314.
(4) *Rajah Leelanund Singh* v *Maharajah Joy Mungul Singh*, 15 W. R., 335: and *Maharanee Brojo Soondaree Debia* v. *Annund Moyee Debia*, 16 W. R., 302.

the existing practice is that interest cannot be given in execution unless it is specially directed to be given.

It appears to their Lordships that the principle of the decisions which have established this practice is sound, and that the plaintiffs have failed to show that the order made by the Chief Court of the Punjab is erroneous in that it has refused to allow interest on the sum of Rs. 12,354-12-0.

Their Lordships have now to consider the cross appeal. The first point taken on that appeal is, that the defendant has been erroneously charged so much of the 12,354 rupees 12 annas as consists of costs which were incurred in the Delhi Court before Mr Gubbins, and were dealt with by the order in Council of the 3rd of February 1858. Now, that prior order in Council came about in this way: When the suit was first brought in the Zilla Court of Delhi by the committee of the lunatic, Mr. Dyce Sombre, Mr. Gubbins, the Judge of that Court, dismissed it on the ground that the claim was barred by the Statute of Limitations. His decision was confirmed on appeal by the Sudder Court of Agra. Against both decrees there was an appeal to Her Majesty in Council. The Judicial Committee thought that the decisions were erroneous; reversed them; and directed that the costs of the suit, so far as they had been occasioned by the improper plea of the Statute of Limitations, should be paid by the defendants to the plaintiffs. That order for payment was never wholly carried out. It was partially carried cut, because the costs incurred in the Appellate Court were paid; but the costs incurred in the Court of first instance—the Court of Mr. Gubbins—do not appear to have been paid; and it is contended on the part of the defendant now that those costs cannot properly be given as part of the costs payable under the order in Council of 1873.

It appears to their Lordships wholly unnecessary to consider the arguments which have been addressed to them touching the plea set up in the Courts of the Punjab, that the claim for these unpaid costs was barred by the Statute of Limitations, or the order passed upon it. Whether it would have been proper for their Lordships in any case to express an opinion as to the merits or effect of those orders in such a proceeding as this, is

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very questionable; but it appears to their Lordships that those orders, taking them at their highest, could only bar the remedy given by the order in Council of 1858 for the recovery of those costs; and that, upon the true construction of the order of 1873, it was the intention of this Committee to give the plaintiffs the whole costs of the suit, so far as they had not been paid, whether incurred in the three Courts in which they are directed to be taxed, or in the Court of Mr. Gubbins. The ordering part of the order in Council directs, not only that the costs in the three specified Courts are to be taxed, but that the amount of the costs of the appellants in all the Courts in India are to be paid to the appellants in India by the respondents; and the judgment of the Committee on which this order was drawn generally expresses that the plaintiffs were to receive their costs of the suit. It also appears that when this matter was discussed in the Court below, Mr. Plowden, who appeared for the defendant, consented to the costs in question being ascertained in that Court, and that thereupon the Court made an order that they should be included in the Rs. 12,354-12, and paid by the defendant to the plaintiffs. This seems to their Lordships to have been a very proper concession on the part of Mr. Plowden, inasmuch as it was equitable that these costs should be paid to the successful party; and reasonable that there should be one order made for the payment of all the costs of the suit, instead of leaving open any questions touching the rights of the plaintiffs under the order in Council of 1858.

Their Lordships, therefore, feel no doubt in affirming the judgment of the Chief Court of the Punjab upon this point.

The next question raised by the cross appeal was with reference to the refund of the sum of Rs. 1,014. There were three points made upon this item: one, that the principal had already been repaid; another, that it was subject to the same objection as that which has just been disposed to with respect to part of the 12,354 rupees; and the third, that it ought not to have been ordered to be refunded with interest. Of the supposed repayment there is no evidence whatever. In an order dated the 8th April 1875, the Senior Judge of the Chief Court of the Punjab says—"The Court, referring to annexure D, has now

before it a sealed copy of the order of Mr. Gubbins, dated 11th September 1849, showing that the sum of Rs. 1,014 was paid by the plaintiffs for the defendant's costs in that year;" and no suggestion that it had ever been refunded seems to have been made before him As to the second point, it is sufficient to say that the general obligation of Government to refund whatever they had received in respect of the costs awarded by the erroneous decrees, although there was no positive direction for a refund in the order in Council, having been admitted, and properly admitted, the objection that this particular sum was paid for costs incurred in Mr. Gubbins' Court, cannot, for the reasons already given, be allowed to prevail.

Upon the question whether this sum, and the further sum of Rs. 5,309, ought to have been ordered to be refunded with interest, their Lordships are of opinion that this case stands clear of what is ruled in the final part of Lord Cairns' judgment in *Rodger* v. *The Comptoir d'Escompte de Paris* (1), because they find that, in the proceedings of the Chief Court of the Punjab, there was a submission to the discretion of the Court, whether interest on these sums should be allowed or not. With the exercise of that discretion in the particular case their Lordships are not disposed to interfere, considering that it is but equitable that the party who has received money under a decision afterwards found to be wrongful should account for that money with interest.

It has, however, been admitted at the bar that there has been an error in the mode in which the interest on the Rs. 5,309 has been directed to be computed, by reason of that sum having been received in three different portions, and at three different dates. It will be necessary to correct this error, but as it ought to have been pointed out to the Court below, the variation in the order will not affect their Lordships' order as to the costs of the appeal.

Their Lordships will, therefore, humbly advise Her Majesty to vary the order under appeal so far as it directs interest at the rate of 12 per centum per annum on the sum of Rs. 5,309 to be

(1) 7 Moore's P. C. C., N. S., 314, at p. 331.

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computed and paid from the 4th of August 1865, by directing that as to Rs. 3,159, part of the said sum of Rs. 5,309, such interest be computed and paid from the 27th of August 1867; that as to Rs. 1,150, other part of the said sum, such interest be computed and paid from the 27th August 1867; and that as to the further sum of Rs. 1,000, being the remainder of the said sum, such interest be computed and paid from the 4th of August 1865; but, subject to such variations, to confirm the said order under appeal, and to dismiss both the appeal and cross appeal. Both parties being thus found to be in the wrong, there will be no costs of the appeals on either side.

Order varied.

Agent for the appellants in the appeal and respondents in the cross appeal: Mr. *T. N. Wilson.*

Agents for the respondents in the appeal and appellants in the cross appeals: Messrs. *Lawford and Waterhouse.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

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M. POGOSE (WIDOW AND REPRESENTATIVE OF J. G. N. POGOSE) (DEFENDANT) *v.* THE BANK OF BENGAL (PLAINTIFFS).*

Principal and Surety—Accommodation Acceptor—Discharge of Surety—Equitable Mortgage—Trust Deed for benefit of Creditors—Eventual Remedy of Surety—Contract Act (IX of 1872), *ss.* 132, 134, 135, 139—*Evidence Act (I of* 1872), *s.* 92.

In the years 1870 and 1873 *A* drew certain bills of exchange upon *B*, which were accepted by *B* for the accommodation of *A*, and endorsed by *A* to the Bank of Bengal. In May 1876, *A*, by letter, agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to *B*; and in the meantime to hold such property at the disposal of *B*, his successors and assigns. In the month of June 1876,

* Regular Appeal, No. 10 of 1877, from a decision of C. B. Garret, Esq., Judge of Dacca, dated the 9th January 1877.

A became unable to meet his liabilities, and in the month of August following executed a conveyance of all his property to the Official Trustee upon trust for the benefit of *A's* creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue *A*. In a suit by the Bank against *B*, as acceptor of the bills—

Held, that *B* was not precluded by the provisions of s. 132 of the Contract Act and s. 92 of the Evidence Act from pleading that he was an accommodation acceptor only; but

Held, that the letter of May 1876 constituted a good equitable mortgage, and that *B* was not thereafter entitled, as against the Bank, to the equitable rights of an accommodation acceptor.

Held further, that the trust deed did not impair the "eventual remedy" of *B*, and that therefore he was not discharged from his suretyship under the provisions of s. 139 of the Contract Act.

THE plaintiffs in this suit sued Mr. Joachim Gregory Nicholas Pogose as the acceptor of certain bills of exchange drawn by Mr. Nicholas Peter Pogose during the years 1872 and 1873, and endorsed by him to the plaintiffs. The defendant died during the proceedings, and the present appeal was prosecuted by his widow. The defendant was at first an accommodation acceptor only, but, on the 19th of May 1876, Mr. N. P. Pogose wrote and sent the following letter to him, which, it was contended by the plaintiffs, constituted a good mortgage, and prevented the defendant from pleading that he had received no consideration:—

"DEAR SIR,—In consideration of your having stood my surety from time to time by signing, accepting, endorsing, and otherwise, bills favouring different parties, all for my sole use and benefit, I hereby agree, on demand, to execute to you, your heirs, executors, administrators, and assigns by way of collateral security, to keep you safe and harmless, and for the payment of the amount of the said bills and their renewals from time to time, amounting in all to rupees two lacs thirty-nine thousand and five hundred, a valid and effectual mortgage of the 5 annas 12 gandas and a half share in the Privy Council decree obtained by the late Nujummunnissa Khatun, confirming a decree of the High Court awarding her the possession and mesne profits of the zemindaries and shares in zemindaries, of which the particulars are given at the foot of this letter, and which said share was purchased by

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me at an execution of decree sale held on the 21st February 1876, at the Court of the Subordinate Judge of Furreedpore, such sale having been confirmed by that officer on the 15th May instant; and I further agree, until the execution of such mortgage, to hold the said 5 annas 12 gandas and a half share of the said decree at your disposal, and at the disposal of your successors and assigns."

In the month of June 1876, N. P. Pogose became unable to meet his liabilities, and the plaintiffs called upon the defendant to pay the amount due upon the bills of exchange accepted by him. On the 9th of August 1876, and before the defendant had paid off any of the bills, N. P. Pogose executed a deed of trust and assignment in favour of the Official Trustee of Bengal, by which he purported to assign all his property, including his estate and interest in the Privy Council decree mentioned in his letter of the 19th May 1876, to the Official Trustee upon trust to realize the same and divide the proceeds equally among the creditors of N. P. Pogose. The deed gave the Official Trustee power to manage the debtor's estates or to appoint managers. It did not contain any composition with or release by the creditors, nor any covenant on their part not to sue. Joachim Pogose did not expressly dissent from the deed. The learned Judge of the Court below held that, according to the terms of s. 132 of the Contract Act, the defendant contracting as principal could not plead that he was within the knowledge of the plaintiffs liable as surety unless he was also able to plead that the plaintiffs had accepted him as surety, and therefore gave the plaintiffs a decree; but held also that the defendant continued to be an accommodation acceptor only, and that the trust deed was prejudicial to the rights of the defendant.

From that decision the defendant appealed.

Mr. *J. D. Bell*, Mr. *Branson*, and Mr. *C. Gregory* for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*), Mr. *Evans*, and Mr. *Stokoe* for the respondents.

Mr. *Bell.*—The Bank of Bengal knew that Mr. Joachim Pogose was only an accommodation acceptor, and the Bank, by signing the trust deed, waived its rights as against Mr. Joachim Pogose Section 132 of the Contract Act embodies the old common law rule as to the liability of principal and surety under guarantees. There is no intention shown anywhere in the Act of altering the principles of equity applicable to negotiable instruments. [GARTH, C.J., referred to *Bailey* v. *Edwards* (1).] It cannot be contended that it was the intention of the legislature to absolutely deprive an accommodation acceptor of his right to plead that he was, to the knowledge of the creditor, only secondarily liable. It is competent to the Court to say that there is nothing in the Act to prevent a surety contracting as principal from having the benefit of the sections which provide for the discharge of a surety. The ruling of Phear, J., in *Punchanun Ghose* v. *Daly* (2) is, I submit, not good law; it is opposed to the judgment of the House of Lords in *The Liquidators of Overend Gurney and Co.* v. *The Liquidators of the Oriental Financial Corporation* (3). That case was not cited to Phear, J. It is clear that any dealing by a creditor with the debtor to the injury of the surety operates to discharge the surety—*Croydon Gas Company* v. *Dickinson* (4); *Polak* v. *Everett* (5); and *Watts* v. *Shuttleworth* (6). It may be argued upon the authority of *Mayhew* v. *Crickett* (7) and *Smith* v. *Winter* (8), that as Mr. Joachim Pogose did not expressly dissent from the trust deed, his liability was revived But the case of *Withall* v. *Masterman* (9) shows that mere knowledge of the fact would not be sufficient to revive the liability of the surety: there must be assent to the deed. By executing this trust deed the Bank have, in the words of s. 139 of the Contract Act, impaired the "eventual remedy" of the surety himself against the principal debtor; and Mr. Joachim Pogose was, therefore, discharged. As soon as the deed

(1) 34 L. J., Q. B., 41.
(2) 15 B L R, 331.
(3) L. R., 7 H. L., 348.
(4) 46 L. J., Q. B., 157.
(5) 45 L. J., Q. B., 369
(6) 29 L. J., Ex., 229.
(7) 2 Swanst., 185, at p 189.
(8) 4 M. & W., 454, at p. 466.
(9) 2 Camp., 178.

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was executed, the Bank lost their right to take proceedings against their debtor, which Mr. Joachim Pogose had a right to require them to do. The trust deed gives property worth ten lacs to the Official Trustee. The Bank can have this realized: they should do equity to the surety and take no steps against him until the property in the hands of the Official Trustee has been applied according to the trusts of the deed. [GARTH, C.J.—How far would such a deed be operative if signed by two or three out of all the creditors?] As soon as the deed is signed by any one of the creditors, he is bound by it. [Mr. *Stokoe* referred to *Ellison* v. *Ellison* (1).] If one creditor came in under the deed, the deed would be irrevocable by the debtor—*Acton* v. *Woodgate* (2) and *Mackinnon* v. *Stewart* (3). It is not necessary, in order to enable creditors to take under a deed of this kind, that they should be parties to it—2 Story Eq. Jur., s. 1036 *a*. [GARTH, C.J.—Suppose that all the creditors are parties, suppose that two sign and that the rest expressly dissent, is the deed to be binding? It clearly cannot bind dissentients.] The moment that the deed is made and assented to by one creditor, the trustee and settlor are bound, and the executing creditor gets the benefit.

Mr. *Branson* on the same side.—Section 132 of the Contract Act was not intended to cover such a case as this. It was intended only to cover cases of guarantees and sureties. The common law rule was laid down in *Hollier* v. *Eyre* (4). The equitable principle that a surety appearing to be a principal may show his suretyship, is stated in *Rees* v. *Berrington* (5). All that the Contract Act does, is to lay down the rule in *Hollier* v. *Eyre* (4). The equitable principle still subsists as to bills of exchange. There can be no doubt that Mr. Joachim Pogose was a surety only; he was not dealt with as a principal, and the evidence of the Bank manager shows that he knew Mr. Joachim Pogose's position.

(1) 1 Wh. and Tudor's L. C., 4th ed., 254; 5th ed., 273.
(2) 2 My. & K., 492.
(3) 1 Sim., N. S., 76, at p. 88.
(4) 9 C. & F., 1, at p. 45.
(5) 2 Wh. and Tudor's L. C., 4th ed., 974; 5th ed., 992.

The *Advocate-General* for the respondents.—The construction put on s. 132 of the Contract Act by the learned Judge of the Court below is perfectly correct; that the Act was intended to apply to negotiable instruments appears from the illustration given to this section, which is one regarding a promissory note. This section is an exposition of the law in *Fentum* v. *Pocock* (1), which was the case of an accommodation bill, and the Contract Act applies precisely to such a case as this. The equitable doctrine has been considered to be unjust by many Judges—2 Latour's Judicial Maxims, 177. At law, an accommodation acceptor is never discharged except by payment, and in this country it is important that this rule should be upheld. The provisions in the Contract Act as to discharge of sureties relate to cases of express sureties only, and not to a case where the parties are primarily liable; and reading the Evidence Act and this Act together, it appears that no evidence outside the cases mentioned in the provisoes shall be received to add to the instrument; so that Mr. Joachim Pogose cannot be allowed to plead that he was a surety only. The equity contended for on behalf of the appellant arises independently of the contract—*Pooley* v. *Harradine* (2); but it cannot be held to exist here when it is expressly barred by the legislature: and, therefore, the doctrine of the *Overend and Gurney case* (3) does not apply to a case under the Contract Act. Such a deed as this, an out-and-out conveyance by a debtor for the benefit of his creditors, is perfectly valid both under s. 240, Act VIII of 1859—*Stephenson* v. *Baumgartner* (4)—and s. 326, and the general law. Neither the debtor nor his creditors could set it aside after it had been executed by the creditors—*Dolphin* v. *Aylward* (5). Suppose the Bank had not signed the deed: they could not have sued, as the conveyance was good, and the property had passed away from the debtor. The Bank could not have taken the property comprised in the deed in execution; all that they would have been entitled to would have been a personal decree or to go against subsequently acquired property. Other cre-

(1) 5 Taunt, 192.
(2) 7 El. & Bl., 431.
(3) L. R., 7 H. L., 348.
(4) 4 Agra H. C. Rep., 104.
(5) L. R., 4 H. L., 486.

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ditors executed the deed, and therefore the Bank would not have had any power to get the deed revoked: that can be done by the debtor if no creditors execute, but not by a creditor—*Dolphin* v. *Aylward* (1). The "eventual remedy" of the surety is not impaired by this deed; the meaning of these words in s. 139 of the Contract Act is, that the "substantial" remedy of the surety must be impaired. Now the circumstances under which the deed was executed show that it was for the benefit of the surety. It is contended that the Bank, by executing this deed, lost their right to sue the debtor, and so damnified the surety; but, as far as the Bank is concerned, they have lost no remedy. A surety who concurs in an arrangement between the debtor and his creditors, is not discharged by such an arrangement—*Ex parte Harvey* (2). Mr. Joachim Pogose cannot be treated as having been throughout an accommodation acceptor only. The letter of the 19th May constituted a perfectly good mortgage to him—*Rajkumar Ramgopal Narayan Sing* v. *Ram Dutt Chowdry* (3); and as soon as he received this security he ceased to be an accommodation acceptor—*Burdon* v. *Benton* (4).

Mr. *Stokoe* on the same side.—Mr. Joachim Pogose was not in the position of a surety contemplated by the Contract Act, and he could not claim the protection provided for a surety by the Act. The Evidence Act and the Contract Act came into force on the same day, and it would be natural to expect that they would deal with cognate subjects in the same way. Now, the only variations of terms allowed by the Evidence Act are those referred to in s. 92. The respondents may show that there was a want of consideration, or that there has been a failure of consideration. There was consideration in this case, and the other provisions in the section do not apply. It is clear, therefore, reading the two Acts together, that Mr. Joachim Pogose could not be heard to say that he was surety only. The case of *Withall* v. *Masterman* (5) has been referred to in support of the

(1) L. R., 4 H. L., 486.
(2) 23 L. J. Bkcy., 26.
(3) 5 B. L. R., 264.
(4) 9 Q. B., N. S., 843.
(5) 2 Camp., 179.

proposition that Mr. Joachim Pogose's liability was not revived by his assent to the trust deed; but that case merely went on the ground that there was no evidence of assent by the surety. The principle laid down in *Rees* v. *Berrington* (1), and distinctly recognized in *Mayhew* v. *Crickett* (2) and *Tyson* v. *Cox* (3), was not dissented from. It cannot now be contended that Mr. Joachim Pogose was an accommodation acceptor throughout all the transactions in this case. An accommodation acceptor is one who gets no consideration for his liability. If he gets any consideration at any time, he ceases to be an accommodation acceptor. The case of *Burdon* v. *Benton* (4) decides that there may be not only consideration for an original acceptance, but also consideration for payment of the bill. Even if Joachim Pogose had no consideration for incurring his liability, yet if he got any consideration subsequently, he could not contend that he was an accommodator. The trust deed and the concurrence of the Bank in it have been put forward by Joachim Pogose as freeing him from his liability, but it is difficult to see how he was prejudiced either by the deed or by the execution by the Bank. The deed purports to be a conveyance to the Official Trustee upon trust to realize the debtor's property and divide it among all the creditors equally. It is evident that, unless there is any positive law which prevents the natural operation of the deed, it must have the effect of preventing the creditors from seizing the property in execution, and therefore of preserving the property until it could be realized to advantage. [GARTH, C.J.—The question is, whether the Bank, by assenting, did not make the deed valid and take away their power of suing Nicholas Pogose?] The surety could have paid the Bank off and insisted on the Bank lending him its name; but the execution of the deed by the Bank had no effect upon their rights as against Nicholas Pogose such as to damage the surety. A surety is not discharged by giving time if the remedies of the

(1) 2 Wh. and Tudor's L. C., 4th ed., 974; 5th ed., 992.

(2) 2 Swanst., 185.

(3) T & R., 395.

(4) 9 Q. B., N. S., 843.

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surety are not diminished or affected—*Hulme* v. *Coles* (1). The fact that the Bank assented is really not material; the result of the deed would have been the same, for other creditors had assented, and that would give validity to the deed. It cannot be said that the position of the surety was altered because the Bank also assented. The deed was communicated to the creditors, and is therefore irrevocable by the settlor; *Acton* v. *Woodgate* (2), in which *Garrard* v. *Lord Lauderdale* (3) was dissented from. Such a deed as this is valid even though if made with the intention of delaying an execution creditor: *Pickstock* v. *Lyster* (4). In considering whether the surety is released, the question always is, whether the deed contains a composition or release. This deed contains neither, and as the debt is still existing, the surety is not released.

Mr. *Bell* in reply.—It has been argued that, as a subsequent security was given, the accommodation has gone; but this rule cannot apply when there has been merely a promise to give security as in this case. [GARTH, C.J.—There is a good equitable mortgage, and the property comprised in it could not be conveyed by the trust deed.] I submit that there was only a personal promise here, not a mortgage. The eventual remedy of the surety was impaired by this deed. It is said that Mr. Joachim Pogose could have paid off the Bank and required the use of the Bank's name in suing, but if the cause of action is burdened by having to add other parties, the remedy is impaired. "Eventual" means at any time; "impair" means damage of any kind whatever; anything which affects the position of the surety in any way, even to such an extent as would entitle him to nominal damages only.

The judgment of the Court was delivered by

GARTH, C.J.—This suit was brought by the plaintiffs, the Bank of Bengal, to recover from Mr. Joachim Gregory Nicholas Pogose, a sum of Rs. 1,10,687-10-2, being the aggregate amount of principal and interest due upon nineteen bills of exchange,

(1) 2 Sim., 12
(2) 2 My. & K., 492.
(3) 3 Sim., 1.
(4) 3 M. & Sel., 371.

each drawn by Mr. Nicholas Peter Pogose upon and accepted by his cousin Mr. J G. N. Pogose, payable to the drawer's order, and endorsed by the drawer to the plaintiff's Bank.

The Court below have decided in the plaintiff's favour; and as the defendant died pending the proceedings, the present defendant, Mrs. Mary Pogose, his widow and representative, became defendant in his stead, and is prosecuting this appeal.

The defence is that Mr. J. G. N. Pogose accepted the bills merely for the accommodation of his cousin and without any consideration; that the plaintiffs were aware of that fact; and that by consenting to and signing a deed of trust, which Mr. N. P. Pogose made of all his property for the benefit of his creditors, the Bank have discharged the defendant from his liability. An attempt was also made to show that the plaintiffs had also discharged the defendant by giving time to the drawer of the bills; but we expressed an opinion during the argument that there was really no ground for this contention, and it was accordingly given up.

The plaintiff's answer to this defence is threefold. They say :—

1*st*.—That by s. 132 of the Indian Contract Act, the defendant is precluded from showing that he was merely surety for his cousin upon the bills, and that his liability to the plaintiffs cannot be affected by that circumstance; and further that, by s. 92 of the Indian Evidence Act, he is also precluded from showing that his legal position and liability is different from what it purports to be on the face of the bills.

2*ndly*.—That, in point of fact, the defendant was not a mere surety or accommodation acceptor without consideration; and

3*rdly*.—That the consent to the execution of the trust deed by the plaintiffs did not operate to discharge the defendant from his liability.

Upon the first of these points, the Judge in the Court below has decided the case in favour of the plaintiffs. He considers that the liability which the drawer and acceptor of these bills have undertaken is a joint liability, and that as the 132nd section of the Contract Act provides that, under such circumstances, the plaintiffs are not to be affected by any relation of principal

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and surety which may exist as between the drawer and acceptor of the bills, the acceptor cannot set up that relation for the purpose of discharging himself from liability, more specially as by law the acceptor is the principal debtor, or party primarily liable upon the bills, and the drawer only liable as his surety.

There certainly seems some difficulty in ascertaining the true meaning of s. 132; but whatever its meaning may be, we are of opinion that it is not applicable to the present case. The liability which is undertaken by the acceptor and the drawer of a bill is in no sense a joint liability. It is true that they each contract to pay the same sum of money, but they contract severally in different ways, and subject to different conditions; and it is not because the law of this country allows several persons who have undertaken different liabilities to be joined as defendants in the same suit that they are to be considered in any sense as having undertaken a joint liability. Upon this point, therefore, we hold that the Judge in the Court below was wrong.

Nor does s. 92 of the Evidence Act present any difficulty in this case. The acceptor of a bill is, no doubt, the party primarily liable upon it; but by the proviso to s. 92 it may be shown that the acceptor never had any consideration for the bill, and that he accepted it for the accommodation of the drawer or some other party. If this were not so, there could be no such thing in India as an accommodation acceptance, because a bill *primâ facie* imports consideration, and the acceptor is the party primarily liable; and if any party to a bill were precluded by this section from proving in a Court of law what his real position was as against the other parties, not only would great injustice be the result, but the commercial and negotiable character of bills of exchange in this country would be very materially changed.

We think, therefore, that the defendant was not precluded in this case from raising his defence upon the merits.

But then comes the next question, was the defendant in the proper sense of the term an accommodation acceptor without consideration? We agree with the learned Judge in

the Court below in thinking it sufficiently proved that, in the first instance, Mr. J. G. N. Pogose accepted these bills, or others of which these bills were renewals, for the accommodation of his cousin; and we think it also pretty clear upon the evidence that the plaintiffs' Bank had knowledge of that fact. But then it appears that, on the 19th of May 1876, at the time when these bills or the renewed bills were maturing, Mr. N. P. Pogose gave the defendant Mr. J. G. N. Pogose a security for the payment of those and a number of other bills amounting in all to Rs. 2,39,500, in these words:—(Reads letter set out, *ante*, p. 175).

The 5 annas 12½ gandas share in the Privy Council decree, which was the subject of this agreement, appears from the evidence to have been valued at upwards of five lacs of rupees; but allowing for a considerable depreciation of that value on account of the difficulties of sale and the unfortunate circumstances in which the Pogose family have been placed, the property might still be sufficient to meet the whole amount of the bills.

It seems impossible to say that, under these circumstances, the defendant was an accommodation acceptor of these bills without consideration. He has received a very substantial consideration for the acceptances in having these large properties pledged to him to meet his liabilities upon these and other bills to a very large amount. We are of opinion, therefore, that the defendant, although in the first inception of the bills he may have put his name to them for his cousin's accommodation, has since received such a substantial consideration for them as to be no longer in the position of a mere surety, nor entitled as against the plaintiffs, who have advanced their money in good faith upon the security of the bills, to the equitable rights of a surety.

Assuming, however, that the defendant was a mere surety, the last question which we should have to determine would be, whether the acquiescence of the Bank in the trust deed of the 9th of August 1876, would operate as a discharge to the defendant. By that deed Mr. N. P Pogose conveyed to certain trustees the whole of his property, which was not previously

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mortgaged or disposed of, upon certain trusts for the benefit of his creditors. The trusts declared were of the usual character. The trustees had general powers to manage the property, to enforce and compound debts, &c., due from or to his estate, and to employ at their discretion Mr. N. P. Pogose himself or any other persons for that purpose. The deed did not contain any release by the creditors, or covenant not to sue, and some of the creditors refused to have anything to do with it; but the plaintiffs' Bank, the Agra Bank, and Mr. T. Christian, acquiesced in the arrangement before the deed was executed by Mr. N. P. Pogose; and the plaintiffs' Bank duly executed it afterwards.

In this state of things it seems clear from the authorities, and in fact it was hardly disputed in argument, that the deed operated to convey Mr. Pogose's available property to the trustees in such sort as to protect it from being sold under any execution against himself; and, under these circumstances, the question arises, whether the acquiescence by the plaintiffs' Bank in such a deed had the effect of discharging the defendant from his liability upon the bills in question. The Judge in the Court below held that it did, on the ground that, by consenting to it, the plaintiffs had disabled themselves from suing Mr. Pogose and taking his person in execution; and that as the defendant had the right to compel the plaintiffs to take proceedings to enforce their claim against Mr. N. P. Pogose upon the bills, the deed had the effect of depriving the surety of one means of enforcing that claim. The Judge considered that the plaintiffs would be prevented from taking Mr. Pogose in execution, because as the trustees were empowered to employ Mr. Pogose in the business of the trust, their powers in that respect would be frustrated by his being taken in execution. But this we think very doubtful. The trustees had a right to employ any other person they pleased besides Mr. Pogose in the business of the trust; and, therefore, his being taken in execution would not really prevent the trusts being carried out effectually.

But there is another ground upon which it seems to us that the rights of the defendant might very materially be effected

by this trust deed. It seems clear that, as against the plaintiffs who were parties to it, the property which it conveyed could not be taken in execution under a decree against Mr. Pogose at the plaintiffs' suit. Assuming then, that Mr. J. G. N. Pogose was in the position of a surety, the deed would as effectually deprive him of the power of enforcing payment of the debt as against that property, as if the plaintiffs had covenanted with Mr. N. P. Pogose not to take it in execution. Such an act on the part of the creditor would, by the law of England, discharge the surety, because, whether the surety was really injured or benefited by it, or was likely to be injured or benefited, would not signify. The mere fact of the surety's position being altered by an act of the creditor, without the consent of the surety, would suffice to discharge the surety.

But here the law, as laid down by the Contract Act, places the surety in a different position. By s. 134 the surety is discharged by any contract between the creditor and the principal debtor, by which the debt is discharged or released. By s. 135 any contract between the creditor and the principal debtor, by which the creditor compounds with, or gives time to, or undertakes not to sue, the principal debtor, is a discharge to the surety, unless the surety assents to such contract. And, lastly, by s. 139, any act which is inconsistent with the rights of the surety is a discharge to the surety, if the eventual remedy of the surety against the principal debtor is thereby impaired. Now, it appears to us that the trust deed, which has been executed in this case by Mr. N. P. Pogose, and assented to by the plaintiffs, cannot be considered either as a giving of time, or a composition, or a covenant not to sue within the meaning of s. 135. If it did, we think there would be ample evidence of Mr. J. G. N. Pogose's subsequent assent to prevent the deed from operating as a discharge. The enactment which applies to the present case is, in our opinion, s. 139. The execution of the trust deed by the Banks, having regard to its effect upon the plaintiffs' remedies against Mr. N. P. Pogose, was an act inconsistent with the rights of the surety, which by the law of England would have discharged him: See

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Calvert v. *The London Dock Company* (1); *The General Steam Navigation Company* v. *Rolt* (2), and other cases to the same effect in the notes to *Rees* v. *Berrington* (3). But under this section, before the act of the creditor can operate as a discharge, it is necessary to look further and see whether by that act the eventual remedy of the surety against the principal is impaired.

For the purpose of solving the question, let us see what the financial position of Mr. N. P. Pogose was at the time when the trust deed was executed. The evidence in the case does not disclose, and perhaps it would be impossible to ascertain with anything like certainty, the amount of his assets and liabilities at that time; but, as far as we can judge, there appeared to be a very fair prospect, if his property were carefully managed, and proper steps were taken to protect it from the cupidity and imprudence of particular creditors, that it would prove sufficient to discharge his debts in full. There is no doubt that his creditors generally had become very much alarmed, and he was being pressed or threatened with legal proceedings from several quarters. His assets consisted mainly of the Privy Council decree which he had purchased; and the whole of his property was of such a nature as not to be readily available for payment of his debts. In order to realize anything like its value, it was absolutely, necessary that it should be protected against executions, and that a reasonable time should be allowed for disposing of it in the best market. Several creditors had already sued, and were on the point of obtaining decrees, under which the property might have been put up to forced sale; and as the plaintiffs were by far the principal creditors, and it was of the utmost importance to them that the property should be well guarded and sold to the best advantage, it appears to us that the very best thing which they could have done for their own benefit, and that of Mr. J. G. N. Pogose's was to consent to the trust deed. That deed, in our opinion, so far from its impairing the

(1) 2 Keen's Rep., 638.
(2) 6 C. B., N. S., 550.
(3) 2 Wh. & Tudor's L. C., 5th ed., 992.

defendant's eventual remedies against Mr. J. G. N. Pogose and his property, tended to improve them most materially; and for this reason we consider that, even assuming the defendant to have been in the position of a surety, the execution of the trust deed did not operate to discharge him.

Upon these grounds we are of opinion that there is no valid defence to this suit, and that the decree of the Court below, although it proceeded upon wrong grounds, should be confirmed.

The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

THE EMPRESS v. HARAI MIRDHA AND UMED SARDAR.*

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Nov. 28.

Criminal Procedure Code (Act X of 1872), s. 263—High Court, Power of—Jury, Verdict of Acquittal by.

Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code—*held* that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

THIS case was referred to the High Court by the officiating Sessions Judge of Nuddea under s. 263 of the Code of Criminal Procedure.

The two prisoners, together with four others, were tried before the officiating Sessions Judge of Nuddea under ss. 302 and 149, and 326 and 149 of the Penal Code. In the case of two of the prisoners, the jury returned a verdict of guilty under s. 326. Two others were found not guilty, but the remaining two, Harai Mirdha and Umed Sardar, though also found not

* Criminal Reference, No. 223 of 1877, from the order of R. Towers, Esq., officiating Sessions Judge of Nuddea, dated the 19th September, 1877.

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guilty on the charges framed, were found, by a majority of three out of five of the jury, to have been present with the others, but it was added that they only went for the purpose of rioting, which the jury explained to mean "in order to punish the deceased to a certain extent, but not to go as far as to inflict grievous hurt on him"

The facts of the case were as follows:—

The deceased was not on good terms with the people of the zemindar, amongst whom were the two prisoners; the two prisoners with others went to the house of the deceased, and the deceased was enticed out, and received two wounds, either of which the evidence went to show were sufficient to kill him. The deceased ran some distance after he was wounded, and the two prisoners, Harai and Umed, were identified by several witnesses as having, with others, ran after the deceased till he fell. Further, Harai and Umed were named to one Badul, who was present when the deceased made his dying declaration as being amongst his pursuers; and although they set up *alibis* in the Court of the Sessions Judge, yet, when previously brought up before the Deputy Magistrate, they admitted they were present, but denied participation in the outrage.

The Sessions Judge being dissatisfied with the verdict of the jury regarding Harai and Umed, submitted their case to the High Court under s. 263 of the Criminal Procedure Code.

The Junior Government Pleader, Baboo *Juggodanund Mookerjee*, for the prosecution.

Mr. *G. Gregory* for the prisoners.

MARKBY, J.—The two prisoners, Harai and Umed, whose case is now before us under s. 263 of the Criminal Procedure Code, were put upon their trial before the Sessions Court on a charge "that being members of an unlawful assembly and in prosecution of the common object of that assembly, they had committed murder." This was a charge under ss. 302 and 149 of the Indian Penal Code. They were also charged "that being members of an unlawful assembly and in prosecution of the common object of

that assembly, they had voluntarily caused grievous hurt." This was under ss. 326 and 149 of the Indian Penal Code. Other prisoners were likewise charged at the same time, and the virdict of the jury as regards these two prisoners was a verdict of acquittal upon both these charges; but in answer to a question put to them by the Sessions Judge, they stated that the two prisoners, Harai and Umed, were in the company of two of the other prisoners, whom they found guilty on the second of the charges I have stated, for the purpose of committing riot, but that they did not commit it, and further that they were not present in order to commit grievous hurt on the deceased, but only to punish him to a certain extent. The Sessions Judge has declined to record the verdict of acquittal as regards these two prisoners, and has referred the case to this Court in order that these prisoners may be convicted under the second of the two charges which I have mentioned. Now we may say that we have been relieved from all difficulty in this case by the course which has been taken by the Government, and which in our opinion has been very wisely and prudently taken. All that the Government now asks for is a conviction under s. 143 of the Indian Penal Code, that is, that the prisoners now before us were members of an unlawful assembly. That really amounts to this, that we are asked now to carry out the legitimate consequence of the finding of fact at which the jury arrived in respect of these two prisoners. If the Sessions Judge had been so minded instead of referring this case to us, he might, as pointed out by Mr. Justice Mitter in the course of the argument, have pointed out to the jury that their finding was in fact a conviction of an offence under s. 143 of the Indian Penal Code, and that, under the provisions of s. 457 of the Criminal Procedure Code, they were at liberty to find the prisoners guilty under that section. They found the prisoners guilty not of the whole of the offence with which they were charged, but upon that part of the charge which amounts to a different offence. This is not a case in which we are called upon to differ in any way from the conclusion of the jury. We adopt this conclusion, and we are also relieved from the necessity of accurately defining what our powers are under s. 263. Whatever may be the exact position

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of this Court in dealing with a reference of this kind under s. 263, as to which we express no opinion, we feel no doubt whatever that this Court has a right to convict a prisoner of any offence which the jury could have convicted him of, upon the charge framed and placed before them. Upon the charge as framed and placed before the jury in this case, the jury could have convicted these prisoners of an offence under s. 143. We therefore, undoubtedly possess that power ourselves. Accordingly we convict these two prisoners of the offence "that they were members of an unlawful assembly, and thereby committed an offence punishable under s. 143 of the Indian Penal Code," and we direct that they be rigorously imprisoned for a period of six months.

PRIVY COUNCIL.

P. C.*
1877
July 7, 10, 11, & 12.

THE ADMINISTRATOR-GENERAL OF BENGAL (PLAINTIFF) *v.* JUGGESWAR ROY AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Inadequacy of Consideration—Suit to set aside deed.

A party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition.

THIS was an appeal from a decree of the Calcutta High Court, dated the 25th June, 1875, reversing a decision of the Judge of East Burdwan, dated the 11th June, 1874.

The suit in which the appeal arises was brought by Robert John Jackson, on whose death the Administrator-General of Bengal, as executor under his will, was substituted on the record as plaintiff, to set aside conveyances executed by the said Jackson of certain lands situated in Bengal, on the ground that he was a minor at the time of the execution, and that he was fraudulently induced by certain of the defendants who stood to

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

him in a fiduciary relation to part with his property, without fully understanding the nature of the transaction and for an inadequate price.

Mr. *Cowie*, Q. C., and Mr. *Doyne* (Mr. *Lowe* with them) for the appellant.

Mr. *Bompas*, Q. C., and Mr. *Joseph Graham* for the respondents.

The history of the case and the issues raised will be understood from their Lordships' judgment, which was delivered by

SIR M. E. SMITH.—This suit was instituted by Mr. Robert John Jackson, who upon his death has been succeeded on the record by the present plaintiff, for the purpose of setting aside certain conveyances by him to the three first defendants of his interest in Mouzah Luchhipore, in the district of Ranigunge, on the ground, in the first place, that he was under age, and in the second place, that he was induced by the defendants, who were trusted servants, but who had abused their fiduciary character, to part with his property without fully understanding the nature of the transaction, and without adequate consideration. Mr. Robert John Jackson was the adopted son of a Mr. Robert Gwynne Jackson (who will be called Mr. Gwynne Jackson), who appears to have been of European extraction. The date of his adoption is one of the questions in the cause, the plaintiff alleging the adoption to have been about the year 1855, and the defendants as far back as 1850. Mr. Gwynne Jackson appears to have resided a great number of years in the neighbourhood, and to have been well acquainted with coal mining. He in 1860 was the manager of the coal mines of Messrs. Apcar and Company, who, it may be observed by the way, entered into an agreement with Jackson the plaintiff to supply him with funds for prosecuting this suit, in consideration of, in the event of his succeeding, his granting them a coal lease.

Mr Gwynne Jackson left the employment of Messrs. Apcar and Company in 1860 on account of their being dissatisfied

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with him, but he continued afterwards up to about 1867 to some extent in their employment in a subordinate capacity, when he finally left it. He appears to have acquired some property, and to have been interested in other coal mines in the neighbourhood.

Shortly before the year 1860, which is the first date material in this case, Mr. Gwynne Jackson bought certain patni and darpatni rights, including the coals in Mouzah Luchhipore, partly from the defendants. It is not disputed that by a deed bearing date the 20th September, 1860, he, being such patnidar and darpatnidar, granted certain subtenures by way of darpatni and sepatni, reserving the minerals, to three of the defendants; but one question in the cause has been, whether that deed was executed at the time it bears date, or at a latet date, not very clearly indicated on the part of the plaintiff, but which the Judge in the Court below has found to be the year 1869.

Gwynne Jackson made a will in 1858, leaving all his property to his son. Subsequently, in 1863, he executed a hibba, which would have the effect of revoking that will, giving all his property, some of which had been acquired since the date of the will, to his son, and in fact denuding himself of all his property, if that hibba is to be taken as intended by him to be then operative.

The deeds, the subject of this suit, were executed in 1870 and 1871, and the last in 1872. These deeds may be divided into two classes. One class is that in which the plaintiff confirms the darpatni and sepatni rights, which were dealt with by the deed bearing date the 20th September, 1860; the other class of deeds, which bear date in 1871, and one of them as late as June, 1872, are deeds of sale, whereby he transfers all the superior interest which he had, together with the minerals which had been reserved in the former deeds.

With respect to one of the main questions in this case, which has been already indicated, namely, whether the conveyance bearing date the 20th day of September, 1860, was executed then or at a subsequent date, their Lordships have intimated, in the course of the argument, that, on the whole, they concur with

the finding of the High Court that that deed must be taken to have been executed at the time when it bears date. If that be so, being prior in time to the hibba, it is unaffected by that instrument, and the subsequent deed of 1870, being merely confirmatory of it, and conferring on the defendants no greater interest than they took under it, is obviously of no importance, and may be allowed to stand with it.

The question remains whether the deeds of 1871 and 1872, conveying, as has been before stated, the remaining and superior interest, together with coals, are to be set aside on any of the grounds which have been alleged. With respect to this point their Lordships also intimated, during the course of the argument, that they saw no sufficient reason to differ from the conclusion of the High Court that the plaintiff had failed to sustain the burden of proof which lay upon him that he was a minor at the time of the execution of these deeds.

The question then arises, in the first place, whether it has been shown that the three first defendants (for it should be stated that the two last defendants are the sub-lessees under them) were in a fiduciary capacity or character to the plaintiff at the time of the execution of these deeds, and were therefore in a position to exercise undue influence over him. Upon this question their Lordships also have come to the same conclusion as the High Court. There is indeed some evidence that Haradhun Misser, the father of Juggeswar Misser, and the two Roy defendants, were at times employed in collieries in which Gwynne Jackson had a share; and there is also some evidence of the latter having acted as his gomashtas with respect to the property comprised in the deed of 1860, but the décision which their Lordships have come to, concurring with the High Court, on the subject of this deed, in a great measure disposes of this class of evidence. Their Lordships see no reliable evidence on the record that at the time of the execution of these documents by the plaintiff they were in any fiduciary character *quoad* him, or in a position unduly to influence his judgment. If that be so, the question is narrowed to whether a fraud was practised upon him.

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It is contended, in the first place, that the nature of the transaction was misrepresented to him; that the defendants represented to him that he was not parting with his mining rights by these deeds, whereas he was, and that the deeds were not explained to him; further, that the sale price was inadequate.

With respect to the deception so alleged to have been practised upon him, the only evidence to be found of it is the evidence of the plaintiff himself, and that evidence is described as untrustworthy by the learned Judge of the inferior Court, who found in the plaintiff's favour. There is no confirmatory evidence of this, and there is contradictory evidence to the effect that the deed was read over and explained to him, and that he understood the language in which it was written.

The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent* v. *Tennents* (1), in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: "The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition."

Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about, or was the victim of some imposition. It should be borne in mind that his father, Mr. Gwynne Jackson, was at hand, and their Lordships concur with the view of the High Court, that Mr. Gwynne Jackson, by the hibba of 1863, did not intend to denude himself of all his property in favour of his son, whom he represents at that time to have been eight years old, and who could not have been more than twelve or thirteen. It probably was a device for the purpose of defeat-

(1) L. R, 2 Scot. Ap., 6.

ng existing or possibly future creditors. Gwynne Jackson mself acted in contravention of that deed, for he sold a property soon after its date without any reference to it, and there is evidence that he continued to act as if he were the owner of the property. Gwynne Jackson was very conversant with coal mining and the character of property in the district, and their Lordships are not satisfied that he was unable to manage his own affairs or to give competent advice to his son until the year 1872, in the early part of which he was admitted to an hospital with an incurable disease of which he died in about the middle of that year. He had granted his property to his son by a hibba, intending, nevertheless, to keep in his hands the control of it through his life, but very probably intending it to operate after his death in favour of his son. His son, no doubt, had an interest in the property as well as himself, and probably the true view of these transactions in 1870 and 1871 is that they were in substance joint transactions by the father and the son. Their Lordships cannot therefore regard the son at these dates as altogether in the position of a minor without any one to advise him. It may be observed that the deed in 1872 was but the completion of the previous transactions.

Independently, however, of this consideration, it cannot, their Lordships think, be said that the purchase-money was so grossly inadequate that its inadequacy amounts to proof of an imposition upon the plaintiff. It is true that there is some evidence, the value of which it is difficult precisely to estimate, that property with coal sold in the neighbourhood for some years' purchase greater than the number of years' purchase for which this property sold, which was with respect to a portion of it twelve years' purchase, and with respect to another portion of it ten years' purchase; and there is evidence, which perhaps is the strongest on this part of the case, that soon after the purchase by the defendants they let a portion of this property on mining leases at a considerable rental, or more properly speaking royalty. It should be observed, however, that these leases give the power to the lessee to terminate them at any time, and *non constat* how long the high rental would continue.

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It has been suggested that the defendants must have known that there was coal under the land, and that they concealed their knowledge from the plaintiff. Even if it were so, putting aside their fiduciary character, and in the absence of any proof of fraud, that would not be enough to vitiate the transaction; but in point of fact their Lordships can find no evidence of this. All the evidence is the other way, namely, that they did not discover the coal until after they had made the purchase; and it may be observed that Gwynne Jackson himself had tried for coal without being able to discover it. It appears, therefore, to their Lordships that this last ground on which it is sought to impeach the validity of the deeds also fails.

On the whole, therefore, their Lordships are of opinion that the High Court was right in affirming the validity of these deeds and dismissing the plaintiff's suit; and they will, therefore, humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

P.C.*
1877
July 12, 13, *and* 25.

DEENDYAL LAL (DEFENDANT) v. JUDGEEP NARAIN SINGH (PLAINTIFF).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu law—Mitakshara—Execution—Sale of interest of one of several Co-sharers in a Joint Estate.

The right, title, and interest of one co-sharer in joint ancestral estate may be attached and sold in execution to satisfy a decree obtained against him personally, under the law of the Mitakshara, as well in Bengal as in Bombay and Madras.

The purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which judgment-debtor possessed.

* *Present*: SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

Quære.—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid?

THIS suit was instituted in the Court of the Subordinate Judge of Gya by Jugdeep Narain Singh as plaintiff against his father Toofani Singh, and Deendyal Lal, the present appellant, as defendants. The object of the suit, as set forth in the plaint, was to recover possession of certain lands which the defendant Deendyal had seized and sold in execution of a decree obtained by him against Toofani Singh, and which he had purchased at the execution sale. The plaintiff alleged in his plaint that the lands in question were joint ancestral property; that the debt in respect of which the decree had been obtained was the personal debt of his father, incurred by him without legal necessity and without the plaintiff's consent; and that, under the law of the Mitakshara, by which the case was governed, the alienation of such property in payment of such a debt was invalid. He, therefore, prayed that the sale in execution should be set aside, and that he should be put in possession. The defendant Toofani Singh made no answer to the plaint. The defendant Deendyal urged in his written statement that, as the plaintiff's father might have other sons born to him, the plaintiff was not entitled under the Mitakshara law to bring an action for possession of the property; that the suit was brought by the plaintiff in collusion with his father Toofani Singh; that the money borrowed by Toofani Singh had been borrowed for necessary purposes, and had been advanced in good faith; that a part of the property in question was not ancestral, but was the separate self-acquired property of Toofani Singh; and that in any event, and assuming the property to be joint and ancestral, and the execution sale to have taken place on account of an improper debt, the plaintiff was not entitled to more than a moiety of the joint estate. The Subordinate Judge held that the possibility of the plaintiff's father having other children afterwards born to him was no bar to the action; that the suit was not collusive in the sense of being fraudulent; that in respect of a sale in execution under a decree of Court, no question as to legal necessity could arise; that the execution sale, which was of the

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right, title, and interest of Toofani Singh, was operative and valid in respect of his share of the joint property; but that the plaintiff under the Mitakshara law was entitled to a moiety of the ancestral property, which consequently did not pass to the defendant Deendyal under the sale. He also found that a portion of the property sold was not ancestral, but self-acquired by Toofani Singh. He accordingly gave the plaintiff a decree for a moiety of such of the property as was ancestral.

This decree was reversed on an appeal by the Zillah Judge who dismissed the suit on the grounds that a suit for possession was not maintainable by the plaintiff during the lifetime of his father, and that the debt, in respect of which the sale in execution had taken place, was incurred under a legal necessity so as to render not merely the particular share of the property belonging to Toofani Singh, but the whole of the undivided estate liable for its payment.

The plaintiff brought a special appeal to the High Court against this order of dismissal, and a Division Bench (PHEAR and AINSLIE, JJ.), by their decision dated the 14th June 1873 (1), reversed the decree of the Zillah Judge. The effect of their judgment was to hold that as the property was enjoyed jointly by the plaintiff and his father, the latter, according to the Mitakshara law, had no distinct legal right to any portion or share which he could pass to a third party, and that the plaintiff was entitled to recover back the whole property sold in execution. In stating the grounds of their decision the Court referred to the case of *Mahabeer Persad* v. *Ramyad Singh* (2), Regular Appeal No. 209 of 1872, which they had decided on the 17th May, 1873, as distinguishable in its circumstances from the present case.

From this decision the defendant Deendyal Lal brought the present appeal to Her Majesty in Council.

Mr. *Joseph Graham*, for the appellant, contended that the case of *Mahabeer Persad* v. *Ramyad Singh* (2), in which the same Judges who tried the present case had enforced an equity in favour of the purchaser at a sale in execution of the interest

(1) 12 B. L. R., 100. (2) 12 B. L. R., 90.

of a co-sharer in joint family property, conflicted with the decision under appeal According to the finding of the Zillah Judge, the decree under which the sale took place was in respect of a debt incurred for necessary purposes. Such debts are charges on the estate. *Hunooman Persad Panday* v. *Mussamut Babooee Munraz Koonweree* (1). The sale in execution was not merely of the personal interest of the plaintiff's father, but of his interest as the manager and representative of the entire estate: *The Court of Wards* v. *Maharajah Coomar Ramaput Singh* (2). [Sir B. PEACOCK.—You brought your action against the father only, the decree was against him only, the sale in execution was of his rights and interest. If you wished to bind the son, you should have made him a party to the proceedings.] We are at the least entitled to possession of the father's moiety of the joint property. The rule of the Mitakshara law against alienation by one of several co-sharers without the consent of the rest applies to voluntary alienations, not to cases in execution. The distinction is recognized in the opinion delivered by the Full Bench in the case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (3). As to the manner in which the law is applied in Madras, see Strange's Hindu law, ed. 1830, Vol. I., p. 202, and the cases of *Virasvami Gramini* v. *Ayyasvami Gramini* (4) and *Palanivelappa Kaundan* v. *Mannaru Naikan* (5). [SIR J. COLVILE.—The Madras Courts hold that an alienation by one of several co-sharers is good for his own share, they do not go on the distinction between alienation and execution.] The decision of Phear and Ainslie, JJ., in *Mahabeer Persad* v. *Ramyad Singh* (6), recognizes the distinction between voluntary alienation and execution. [SIR R. COLLIER.—If the plaintiff recovers possession of the family estate, he recovers under a charge. SIR B. PEACOCK.—He will recover the estate less what his father would have been entitled to on a partition.]

The respondent not appearing, the case was heard *ex parte*.

(1) 6 Moore's I. A., 391
(2) 14 Moore's I. A., 605.
(3) 3 B. L. R., F. B., 31, at p. 37.
(4) 1 Mad. H. C Rep., 471.
(5) 2 Mad. H. C. Rep., 416.
(6) 12 B. L. R., 90.

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Their Lordships took time to consider their judgment which was delivered by

SIR J. W. COLVILE.—The respondent in this case is the only son of one Toofani Singh, and, the family being governed by the law of the Mitakshara, is joint in estate, in the strict sense of the term, with his father. On January 28th, 1863, the father being indebted to the appellant to the amount of Rs. 5,000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent. per annum. The appellant afterwards put this bond in suit, and on May 30th, 1864, obtained a decree against Toofani Singh for the sum of Rs 6,328-13-8. He took no proceedings to enforce this decree, which was in the form of an ordinary decree for money against the property especially hypothecated; but in September, 1870, caused "the rights and proprietary and mokurrary title and share of Toofani Singh, the judgment-debtor," in the joint family property, which is the subject of this suit, to be put up for sale in two lots for the realization of the sum of Rs. 11,144-6-4, the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs. 900 and Rs. 10,100. Objections were taken to this sale by the judgment-debtor, which, after going through all the Courts, were finally overruled, and the appellant obtained the usual certificate title, and in January, 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February, 1871, the respondent brought the suit, out of which this appeal arises, for the recovery of the whole property on the ground that, being according to the law of the Mitakshara, the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter, which had been incurred without any necessity recognized by the Shastras or the law. The father was joined as a defendant.

The issues on the merits settled in the cause were—

1. Did Toofani Singh borrow money from the defendant (the appellant) under a legal necessity or without a legal necessity? And are the auction sales and other proceedings taken in

satisfaction of the debt all illegal, and ought they to be set aside or not?

2. Under the Mitakshara law, is the plaintiff entitled to the entire property sold in satisfaction of his father's debts, or to how much?

3. Was some portion of Mouzah Domrawun personally acquired by the plaintiff's father, or was it acquired by the ancestral funds and property?

A good deal of evidence was given in the Court of First Instance as to the nature of the debt incurred by Toofani Singh, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the plaintiff was directed to show that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand, the defendant (the appellant) brought witnesses to prove that part at least of the money, *viz.*, Rs. 1,500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the plaintiff was cognizant of his father's transactions, and the whole debt, one which bound both co-sharers.

The Subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon the issue. In one passage of his judgment he says: "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not" In another passage he says: "The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment-debtor, cannot be regarded as including the right of the son of the judgment-debtor which he derived under the Shastras; and so far as the plaintiff's share is concerned, the sale cannot be confirmed." This seems to be the ground on which he

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proceeded ; for he gave the plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

On appeal this decree was reversed by the Zillah Judge of Gya, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the property that may have belonged to Toofani Singh, but the whole undivided estate was liable for the debt.

The respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th June, 1873 reversed the decree of the lower Appellate Court, and ordered that the plaintiff should obtain possession from the defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard *ex parte*, is against that decree.

A good deal of the argument at their Lordships' bar was addressed to the question of the nature of the judgment debt, and whether or not there was "legal necessity" for the loans of which it was composed. Whatever may be their Lordships' opinion of the finding of the Zillah Judge upon this point, they must for the purposes of this appeal treat it as conclusive. The appeal is only from the order on special appeal ; and on that special appeal the High Court could not have disturbed the finding of the lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

This issue, however, seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property, and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly, and have made those co-sharers parties to it. By the proceedings which he took he could not get more than what was seized and sold in execution, *viz.*, the

right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugenderchunder Ghose* v. *Srimutty Ramunee Dossee* (1) and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (2).

The first and principal question, however, that arises on this appeal is, whether the appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitakshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In Lower Bengal, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the Dayabhaga, the rights which they have under the law of the Mitakshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of the judgment-debtor, and acquires the right as against the other co-sharers to compel a partition. That a similar rule prevails in the south of India, though the law there administered is founded on the Mitakshara, is shown by two cases decided by the High Court of Madras—*Virasvami Gramini* v. *Ayyasvami Gramini* (3) and *Palaniselappa Kaundan* v. *Mannaru Naikan* (4). The latter case was one in which, as here, the co-parceners were father and son. And that the law is to the same effect in the Presidency of Bombay was ruled in the two cases which are reported at pp. 39 and 182 of the first volume of the Bombay High Court Reports.

All these cases, however, affirm not merely the right of a judgment-creditor to seize and sell the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal.

(1) 11 Moore's I. A., 241.

(2) I. L. R., 1 Cal., 133, S. C. L. R., 2 Ind. Ap., 275.

(3) 1 Mad. H. C. Rep., 471.

(4) 2 Mad. H. C. Rep., 416.

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In 1869 the question was carefully considered by the High Court of Calcutta. A Division Bench of that Court referred it to a Full Bench in the case of *Sadabart Persad Sahu* v. *Foolbash Koer* (1). The decision of the Full Bench is reported in the third volume of the *Bengal Law Reports* (2). The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitakshara, as administered in the Presidency of Fort William, "Bhagwan Lall," whose act was in question, "had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard *ex parte*. This Committee, for the reasons stated in their judgment (3), did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships said they "abstained from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued. That question must continue to stand, as it now stands upon the authorities, unaffected by the judgment on this appeal."

It is, however, to be observed that even the Full Bench in the case under consideration recognized a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice (4) says:—"It is unnecessary for us to decide whether, under a decree against Bhagwan in his

(1) *Gundo Mahodev* v *Rambhat*, 1 *Bom.* H. C. Rep., 39, and *Damodhar Vithal Khare* v. *Damodhar Hari Sowan*, *Ibid*, 182.

(2) 3 B. L. R., F. B., 31.

(3) I. L. R., 1 Cal., 226; S. C. L. R. 3 Ind Ap., 7.

(4) 3 B. L. R., F. B, 37.

life-time, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized, but the case as against Bhagwan and that against the survivors are very different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate."

The decision in *Sadabart's* case has been followed by, amongst others, that of *Mahabeer Persad* v. *Ramyad Singh* (1), being the case referred to in the judgment under appeal as No. 209 of 1872.

That was a decision by the two learned Judges who passed the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bond-holder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged "necessity" for the loan. The Court laid down in the strongest terms (2) the law as established by the Full Bench ruling in *Sadabart's* case and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment-debtor, should be subject to the lien of the judgment-creditor for the money advanced, with interest. In the present case, the same Judges have refused to recognize any such equity, proceeding on the ground

(1) 12 B. L. R., 90. (2) *Ib.*, p. 94.

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that the execution was taken out not against the property specially hypothecated, but against the general estate.

It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in *Sadabart's* case. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the lower Appellate Court that "legal necessity to borrow the money existed;" whereas, in the case of 1872 there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the defendant in this case the benefit of the equity which they enforced in the other.

But what is the effect of the decision in the case No. 209 of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the Presidency of Fort William which is governed by the Mitakshara, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his co-partners, the purchaser of it at an execution sale nevertheless acquires a lien upon it to the extent of his debtor's share and interest.

There appears to be little substantial distinction between the law thus enunciated and that which has been established at Madras and Bombay, except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a broad and general rule defining the right of the creditor.

Their Lordships, finding that the question of the rights of an execution-creditor, and of a purchaser at an execution-sale, was expressly left open by the decision in *Sadabart's* case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras. They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's* case

as to voluntary alienations. But, however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution-sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the co-parceners in such an estate, if the right of the purchaser at the execution-sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded, before the alienation of his share took place.

In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the respondent. But they think that the decree should be varied by adding a declaration that the appellant as purchaser at the execution sale has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty accordingly. They desire to add that they cannot make any more precise declaration as to Toofani Singh's share, since, if a partition takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.

Decree varied.

Agents for the appellant: Messrs. *Watkins* and *Lattey*.

P. C.*
1877
July 6.

LEKHRAJ ROY AND OTHERS (PLAINTIFFS) *v.* KUNHYA SINGH AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Construction, Rules of—Grant for an Indefinite Period.

The rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey.

THIS was an appeal against a judgment and decree of the Calcutta High Court, dated the 4th April 1872 (1), by which an application made by the appellants for admission of a review of a judgment of the said Court passed on the 23rd June 1871 (2), was dismissed.

The only question arising on this appeal was as to whether, under a lease of certain lands granted to the father of the respondent, Kunhya Singh, by one Choonee Lall, through whom the appellants claim, there passed to the lessee merely an interest for his own life, as contended by the appellants, or one which was to continue as long as the tenure of the lessor, as contended for by the respondents.

Mr. *Leith*, Q.C., and Mr. *Doyne*, appeared for the appellants. Mr. *Cowie*, Q.C., and Mr. *John Cutler*, for the respondents.

The material circumstances of the case will appear from their Lordships' judgment, which was delivered by

SIR M. E. SMITH.—This suit was brought by the present appellants to obtain possession of an eight-anna share of Mouza Toee, and the plaint also prays for the annulment of the mokurari tenure which the respondents claimed to have in the mouza under a potta granted by one Choonee

**Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 18 W. R., 494. (2) 14 W. R., 262.

Lall. The appellants are the purchasers under a decree obtained against some persons who had become possessed of part of the interest of Choonee Lall in the eight-anna share of the mouza. The respondents are the heirs of Nirput Singh, who was the grantee under the potta. The single question in this appeal is, whether, upon the true construction of this potta, and upon the evidence in the case, the grant was one to endure for the life of Nirput Singh only, or whether it was to endure so long as the interest of Choonee Lall existed. That involves also an inquiry into what the interest of Choonee Lall was.

The lease or potta in question is dated in April 1808, and the material parts of it are in these terms: "The engage-"ments and agreements of the potta on the kabulyat of "Nirput Singh, lessee of Mouza Toee, Pergunna Malda, "Zilla Behar, are as follows: Whereas I have let the entire "rents of the mouza aforesaid,"—describing what he had let,—"at an annual uniform jumma of sicca Rs. 606, without "any condition as to calamities, from the beginning of 1215 "Fusli to the period of the continuance of my mokurari." That is the term fixed in the potta. It is a term "from the "beginning of 1215 Fusli to the period of the continuance "of my mokurari." Then it is required that the lessee should cultivate, "and pay into my treasury the sum of sicca Rs. 606, "the rent of the mouza aforesaid, for the period aforemen-"tioned, according to the instalments, year after year." Then there is this provision, "if, hereafter the authorities desire to "make a settlement of the property at that time, he shall pay "the jamma thereof separately according to the Government "settlement." It concludes, "hence these few words are "written and given as a potta, to continue during the term "of the mokurari, that it may be of use when required. "The annual jumma malguzari, including the malikanna, "Rs. 606."

To ascertain what is the term granted by this potta, we must see, in the first place, what is the interest which the grantor Choonee Lall had. He calls it a mokurari interest; but whether it be a true mokurari interest or not, it was

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evidently the intention of the parties that the grant should endure during term of his interest. If it can be ascertained definitely what that term is, the rule of construction that a grant of an indefinite nature enures only for the life of the grantee would not apply. If a grant be made to a man for an indefinite period, it enures, generally speaking, for his lifetime, and passes no interest to his heirs, unless there are some words showing an intention to grant an hereditary interest. That rule of construction does not apply if the term for which the grant is made is fixed or can be definitely ascertained.

Now it appears that as early as 1788 the Government granted what has been called a mokurari lease to Mahomed Buksh, and that lease, after various intermediate assignments, was ultimately purchased by Choonee Lall, the grantor of the potta in question. Choonee Lall is said to have purchased it in 1807 or 1808. It is also said that he had purchased the proprietary interest in two annas of the mouza. From the document which has been produced from the Collector's office, other persons appear to have been proprietors of the remaining annas but nothing is heard of them in this suit. However that may be, it does not really affect the present question, because the interest pointed at in the potta in question is a mokurari interest. The kabulyat of the lease of 1788, signed by Mahomed Buksh, is as follows:—"Whereas I have obtained a lease "of Mouza Toee, Zilla Kosra, Pergunna Malda, the area "whereof, by estimation, is 709 bigas 10 cottas, from 1196 "(one thousand one hundred and ninety-six) Fusli, at a jumma "of sicca Rs. 400"—with certain exceptions—"I do acknow-"ledge and give in writing that I shall continue to pay the "rent of the mouza aforesaid at the said jumma, year after "year, according to the kabulyat and the kistbundi. If any "one establish his zemindari (proprietary) right in respect of "the said mouza in his own name before the authorities, I "shall continue to pay, year after year, to him or his heirs, the "'malikana' (proprietary allowance) thereof at the rate of "Rs. 10 per cent. on the jumma aforesaid, in addition to the "Government revenue." The lessee is to pay a jumma of Rs. 400 and a malikana of 10 per cent. on the jumma. Of

course, if Mr. Leith is right that Choonee Lall became the owner of the proprietary interest, the malikana would go into his own pocket. Then at the end there is this clause, which has given occasion to considerable discussion: "If the present "officers of the British Government, or any authority who "may come hereafter, do not accept my mokurari lease to be "hereditary, I acknowledge that this kabulyat is only for one "year, thereafter it shall be cancelled." That, undoubtedly, acknowledged a power in the Government to put an end to this lease, which is called a mokurari lease, at the end of one year. But it appears that the Government have not done so. It may be that it was contemplated that the Government would settle in the ordinary way with the proprietors for the revenue, and in that case would put an end to this mokurari. But it appears that no settlement has been made, and that this lease has been allowed to go on without being put an end to; and although, it is not perhaps properly a mokurari, inasmuch as practically the Government could enhance the rent, it must be regarded, as long as it goes on, as an hereditary lease, a mourasi potta. This being the interest of Choonee Lall (he having become the purchaser of this potta), he grants this lease to Nirput Singh to endure during the continuance of it. That interest, which continues, and has not been determined by the British Government, being an hereditary interest, there seems to be no reason why, upon the construction of the potta in question, it should be held to be limited to the life of Nirput Singh. As already observed, the duration of the term is capable of being definitely ascertained by reference to the interest which the grantor himself has in the property.

Their Lordships think that this case may be decided upon the construction of the document, and that it is not necessary to have recourse to the exposition of it to be derived from the conduct of the parties. It is satisfactory, however, to find that the view which has been taken by their Lordships of the construction of this document is that which the parties themselves evidently entertained, because for twelve years after Nirput Singh's death his heirs were allowed to remain in

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possession of the property precisely in the same way in which he had held it, paying the same rent.

Their Lordships agree with the judgment of the High Court given upon review, and they will humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs,

Appeal dismissed.

Agent for the appellants, Mr. *S. L. Wilson.*

Agents for the respondents: Messrs. *Barrow* and *Barton.*

P. C.*
1877
June 9 & 12.

PARICHAT (DEFENDANT) *v.* ZALIM SINGH (PLAINTIFF).

[On Appeal from the Court of the Judicial Commissioner, Central Provinces.

Mitakshara—Alienation of Ancestral Property—Illegitimate Son—Maintenance.

Since by the Hindu law the illegitimate son of a person belonging to one of the "twice-born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate being in performance of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the Mitakshara.

Quære.—Whether under the Mitakshara law a father who has no child born to him is competent, without legal necessity, to alienate the whole or any part of the ancestral estate; or whether the rights of unborn children are so preserved as to render such an alienation unlawful?

IN the suit in which this appeal was brought, Zalim Singh claimed to recover from Rajah Parichat possession of a village which he alleged had been granted to him under a sannad by way of maintenance by Bahadoor Singh, the late Rajah of Belhera, whose illegitimate son he was, and from which he had been dispossessed by the defendant, the present Rajah. The defendant denied the *factum* of the sannad. He also denied its validity. The Deputy Commissioner of Saugor, in whose Court the suit was brought, held that the village had been assigned to the plaintiff by his father for his maintenance, and

* *Present*: SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

that the assignment was valid. But, on it appearing that the plaintiff had mortgaged the village to a stranger, he was of opinion that he ought not to be restored to possession. He, accordingly, made an order that the defendant should pay the plaintiff a yearly maintenance of Rs. 680, being the estimated value of the village.

This decision was affirmed on appeal by the Commissioner; but on special appeal by the defendant, the Judicial Commissioner of the Central Provinces, on the 24th March 1874, reversed the decree of the Deputy Commissioner, and gave Zalim Singh a decree for possession of the village. Zalim Singh was not present, and took no part in the proceedings under the special appeal to the Judicial Commissioner. The present appeal was brought by Rajah Parichat against the Judicial Commissioner's order.

Mr. *Cowie*, Q.C., and Mr. *Joseph Graham* for the appellant. —The Deputy Commissioner decreed not what the plaintiff had asked for in his plaint, namely, the possession of land, but an annuity, for which he had not asked. On our special appeal for a reversal of this order the plaintiff did not appear. The Judicial Commissioner set aside the order of the Deputy Commissioner, and in the absence of the plaintiff gave him a decree for the land to which the Deputy Commissioner had held he was not entitled. In the absence of a cross-appeal on the part of the plaintiff, or objections taken by him to the decisions of the lower Courts, the Judicial Commissioner had no jurisdiction to make a decree in favour of the plaintiff at variance with the decree of the Deputy Commissioner. He ought to have dismissed the suit. Section 348, Act VIII of 1859, did not apply to such a case. It might be admitted that the plaintiff, an illegitimate son, was, under the Hindu law, entitled to maintenance out of his father's estate—*Chuoturya Run Murdun Syn* v. *Saheb Purhulad Syn* (1). There was evidence, however, that the plaintiff's father had separate self-acquired property, out of which provision for the plaintiff's maintenance might

(1) 7 Moore's I. A., 18.

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have been made. Under such circumstances the grant out of the ancestral estate could not be justified on the ground of necessity, since the separate estate of the father was primarily liable—*Muttusawmy Jagavera Yetappa Naicker* v. *Venkataswara Yetaya* (1). The case was governed by the law of the Mitakshara, under which it was not competent for one of several co-sharers to alienate even his own interest in joint ancestral property without the consent of the co-sharers. Under that law a father could not make a voluntary alienation without the concurrence of his sons, and a son born after an alienation would not be bound by it—*Rajah Ram Tewary* v. *Luchmun Persad* (2), and the passages of the Mitakshara there cited; see also *Modhoo Dyal Singh* v. *Golbur Sing* (3). Assuming the right of Rajah Bahadur Singh to charge the zemindary to a reasonable amount with the plaintiff's maintenance, it was not necessary, nor competent for him, to alienate for that purpose a specific part of the zemindary in perpetuity.

The respondent did not appear.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—This is an appeal from an order made by the Judicial Commissioner of the Central Provinces, whereby he has decreed to the respondent, the plaintiff in the suit, who does not appear upon this appeal, the possession of a certain village called Simeeria. The facts, so far as it is necessary to mention them, may be very shortly stated. The father of the appellant, the late Rajah Bahadur Singh, was the owner of an estate consisting of five villages, one of which was this village of Simeeria. They had been held by his ancestors for a long time, but there seems to have been some doubt to what extent they were rent-free, though enjoyed by him as such. Ultimately, however, the Government of the North-West Provinces determined to recognise the right of the Rajah and his heirs to hold them in perpetuity as rent-free. Before

(1) 12 Moore's I.A., 203.

(2) B. L. R., Sup. Vol., 731; S. C., 8 W. R., 15.

(3) B. L. R., Sup. Vol., 1018; S. C., 9 W. R., 511.

that question (which is not material to the decision of the present appeal) was settled, the Rajah having then no legitimate son, but having an illegitimate son, the plaintiff, Zalim Singh, executed a sannad which, with the omission of certain names and titles of the parties, is in these words:—"This sannad is granted by Rajah Bahadoor in favour of you, Zalim Singh, pledging to you the possession of Mouzah Simeeria, which you will hold and enjoy in perpetuity for your personal expenses, food, clothing, pán, masala. You are to receive as written herein, and to be regular in rendering your service." Delivery of possession of the village seems to have followed upon the grant, and Zalim Singh was in possession of it when his father died, and continued to be in possession during the period while the estate was administered for the appellant, the legitimate son and heir of the Rajah, by the Court of Wards. The appellant, however, on coming of age appears to have ejected Zalim Singh from the possession of the village. The latter then brought this suit, in which he claimed the possession of the village "as granted to him for his maintenance by the sannad;" and the statement of his pleaders, who were examined in the cause, contains the following passage:—"It is true that the proprietary rights of this village with others belonging to the jaghir were given at the settlement to Parichat (the appellant) as head of the family; this Zalim Singh does not dispute, nor does he claim proprietary rights, but as he belongs to the family, and as his father considered this village sufficient for his support, he claims possession of the same, or a payment in money equal to the profits of the village." And in answer to a direct question by the Court why at the settlement Zalim Singh did not claim proprietary rights, they said, "Zalim Singh only wished for support, and it would have interfered with the position of the head of the family to have broken up the estate by having the proprietary right bestowed on any other than the head of the family." In these circumstances their Lordships do not deem it necessary on this appeal to consider whether upon the true construction of the sannad it was such a grant in favour of Zalim Singh as would enure for the benefit of his children, if

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he had any, or enable him, upon an alienation of the village, to give a good title to the purchaser. It seems to them that all that is raised on the present record is the right of Zalim Singh to the present possession of the village.

The course the litigation took was as follows:—The right of Rajah Bahadoor Singh to make such a grant was contested. That issue was found in favour of the plaintiff and against the defendant. The *factum* of the grant was also contested. That issue must be taken to have been conclusively found by the judgment of the Deputy Commissioner confirmed by that of the Commissioner in favour of the plaintiff. It came out, however, before the Deputy Commissioner that after Zalim Singh had been ejected from the possession of the village, he had executed a mortgage of it in favour of some money-lender; and thereupon the Deputy Commissioner came to the conclusion that the plaintiff was no longer entitled to hold the village in khas possession and to receive the collections; but that having a distinct right to maintenance, and having had this village assigned to him by way of maintenance, he was at all events entitled to receive what may be called the net proceeds of it after the expenses of management, collection, and the like were provided for, such proceeds being estimated at the annual sum of 680 rupees. And he made a decree accordingly, which on the appeal of the defendant was confirmed by the Commissioner. Zalim Singh did not appear in the Commissioner's Court, or join in that appeal. It further appears that after the decision of the Commissioner he proceeded to take out execution, and recovered the amount which had been awarded to him by the Deputy Commissioner. In that state of things the defendant, the present appellant, saw fit to carry the case before the Judicial Commissioner by a special appeal, and the two material grounds of that appeal are the first and the fifth. In the first he says:—"The Lower Courts are wrong in law in holding that Rajah Bahadoor Singh had power to alienate ancestral immoveable property in the way he is alleged to have done by the sannad put forward by the plaintiff." In the fifth he says:—"The lower Courts are wrong in law in decreeing maintenance in plaintiff's favour, notwithstanding that his

plaint was simply for possession of the village of Simeeria, and was never amended so as to enable the Courts to give a decree for maintenance." The Judicial Commissioner in dealing with this special appeal yielded to the last ground of appeal, and held that the lower Courts had gone beyond their proper functions in making a decree for maintenance in money instead of awarding possession of the village; but he assumed that he had a right to make the decree which he thought ought to have been made on the merits of the case, and he accordingly varied the decree of the Courts below by giving a decree for possessson. His decree, which is that now appealed from, is: "That the decrees of both the lower Courts be reversed, and a decree granted for possession of Mouzah Simeeria to plaintiff, special respondent," with costs.

It has been argued that to make this decree upon a special appeal was *ultra vires* of the Judicial Commissioner, the Courts below having decided against the plaintiff's claim to possession, and he having acquieseed in their decisions. It seems, however, to their Lordships that the appellant himself re-opened that question. He took the cause before the Judicial Commissioner. By his fifth ground of appeal he contended that the particular decree which had been made was improperly made; by his first ground of appeal he contended that the suit ought to have been dismissed. If he were right on the former point, but wrong upon the latter, it became necessary for the Judicial Commissioner to make some decree, and therefore the question what decree was proper to be made upon the pleadings and evidence in the cause was necessarily open and raised before him.

A more substantial question is that raised by the first ground of appeal. Their Lordships do not think it necessary in this case to determine the question, whether, under the Mitakshara law, a father who has no child born to him is or is not competent to alienate the whole or part of the ancestral estate; whether the rights of unborn children are so preserved by the Mitakshara as to render such an alienation unlawful. When that question does come distinctly before them, it will of course be their duty to decide it; but upon the present appeal they abstain from laying down any positive rule one way or the

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other. It seems to them that the objection in this case goes only to the particular alienation by the sannad, which stands upon a different footing. It appears to be unquestionably the law that the illegitimate son of a person belonging to one of the twice-born classes, and the Rajah may be assumed to fall within that category, has a right of maintenance. Therefore, in assigning maintenance to Zalim Singh his father was acting in the performance of a legal obligation. He could not consult his legitimate son, because at that time there was no legitimate son born, and therefore looking to the purpose for which the grant made by the sannad, whatever may be its extent, was made, their Lordships think that it would not fall within the prohibition, supposing, which they are far from deciding, that a father, having no legitimate son, is by the Mitakshara law incompetent to alienate ancestral estate to a stranger. Their Lordships, therefore, without, as has been said before, determining anything as to the extent of the grant, are of opinion that upon the question whether the Rajah Bahadoor had power to make it, the concurrent decisions of the three Courts in India were correct; and on the whole case they are of opinion that the decree of the Judicial Commissioner is right, and ought to be affirmed; and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal. There will be no costs, as the respondent has not appeared.

Appeal dismissed.

Agents for the appellant: Messrs. *Watkins* and *Lattey*.

ORIGINAL CIVIL.

Before Mr. Justice Kennedy

EDE v. KANTO NATH SHAW.

1877 *June* 13 & 18.

Contract, alteration of, after Signature—Contract Act (IX of 1872), s. 37.

To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract had been signed by the defendant, added in the margin. "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held*, that the addition of the words in the margin did not amount to an alteration within the rule of English law.

the alteration must be either something which appears to be attested by the signature or something which alters the character of the instrument.

THIS was a suit for Rs. 5,463-14 as damages for breach of contract.

On the 23rd June 1876, the following contract, which was a printed form filled in, was entered into between the plaintiffs and defendant :—

Contract between Ede and Hobson, merchants, Calcutta, and the undersigned.

Ten days' demurrage to be allowed at the rate of Rs 250 (Company's rupees) per diem.

"The merchants agree to sell, and the undersigned to buy, the goods undermentioned at the price specified below, and on the following terms:—The salt to be taken delivery of at the rate of 60 tons per custom house working day, commencing from the time that notice is given to the buyers that the ship is ready to begin to discharge. Price to be paid by the buyers against delivery of the salt at the rate of Rs. 58 per 100 maunds. Buyers to pay cash of weighing, amounting to Re 1 per 100 maunds. Rupees 501 to be deposited by the buyers as security for the fulfilment of this agreement, which deposit will be forfeited in event of non-fulfilment thereof, and the seller will have the right to re-sell the salt and sue the buyers in a Court of law to recover any deficiency thereby arising, but any surplus shall belong to the sellers. About 1,750 tons salt ex *British Envoy*, or whatever quantity the ship may bring, June, sailing from Liverpool."

(Signature of defendant)

The defendant failing to take delivery of the salt, the present suit was brought for breach of contract. The only defence material to this report was that contained in the following paragraph of the defendant's written statement :

"Some time after the defendant had signed the said printed form, the plaintiffs requested him to sign or initial some conditions which the plaintiff had inserted on the said printed form; but the defendant declined to do so, on the ground, as he, the defendant, then expressly reminded the plaintiffs that the said alleged contract was a merely nominal one, and that he, the defendant, had nothing whatsoever to do with it; and the

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defendant submits that even if the said printed form had been originally valid and binding on the defendant, the alteration thereof by the plaintiffs after signature by the defendant and without his consent would render the same void." The alleged alteration was the addition by the plaintiff, after the defendant signed the contract, of the words in the margin—"Ten days' demurrage to be allowed at the rate of Rs. 250 per diem."

Mr. *Trevelyan* for the plaintiffs contended that the rule laid down in *Master* v. *Miller* (1) does not apply where the alteration is satisfactorily explained: Smith's L. C., 7th ed., 913, Vol. I. Here the evidence gives a satisfactory account of the alteration. The reason of the rule is to prevent a person from benefiting by his own fraud, and where there is no want of *bonâ fides*, the rule does not apply; see *per* Buller, J., 335. Here, moreover, the alteration is not to take effect until after the time for the performance of the contract has expired; it is merely adding to the contract what the law would itself add, as the addition of the words "on demand" to a promissory note: *Aldous* v. *Cornwell* (2). This is an alteration the law would imply, and therefore immaterial. [KENNEDY, J.—It may be a question whether it is not a mere rule of evidence and provided for by the Evidence Act.]

Mr. *Bonnerjee* for the defendant contended that the alteration was a material one, and vitiated the contract; and referred to *Davidson* v. *Cooper* (3) and *Patterson* v. *Luckley* (4). The Evidence Act does not assist the plaintiffs. The alteration here is a part of the document itself [KENNEDY, J., referred to *Chandrakant Mookerjee* v. *Kartick Charan Chaile* (5).] The alteration being a portion of the document and being a material alteration, avoids the whole contract.

Mr. *Trevelyan* in reply.—I have been unable to find any authority that this is a rule of evidence. Where a deed has

(1) 4 T. R., 320. (2) L. R., 3 Q. B., 573.
(3) 11 M. & W., 795; S. C. on appeal, 13 M. & W, 343.
(4) L. R., 10 Exch., 330. (5) 5 B L. R., 103.

been varied, the variation does not divest the estate, but only alters the evidence of title: *West* v. *Steward* (1). There is nothing in the contract to allow the defendant to unload salt after the contract time, so that the alteration is a new contract: it is quite outside the original contract: the original contract still stands and the plaintiff can recover on it.

KENNEDY, J. (after finding on the evidence in favour of the plaintiff) continued:—The next question is with respect to the alleged alteration. As to that I fully believe the plaintiffs' account of what occurred, and discredit the defendant's. However that may be, I do not think that the words amounted to an alteration or addition within the rule of English law. I think the alteration must be either something which appears to be attested by the signature or something which, as in *Davidson* v. *Cooper* (2), alters the character of the instrument I was not referred to authorities on what constitutes an alteration, but on the principles upon which *Pigot's case* has been extended to contracts not under seal, I think it must be so. Endorsements, marginal observations, &c., &c., clearly do not come within that principle, and I think that this does not. Possibly, this would not be said to be a forgery within s. 464 of the Penal Code, cl. 2; and on comparison with *Master* v. *Miller* (3) I think that nothing which would not come within that section would be sufficient, at least if the element of fraud was proved. It is *primâ facie* a mere statement of a fact which does not appear to be a part of the contract, or covered by the signature. *Chunder Kant Mookerjee* v. *Kartick Charan Chaile* (4), so far is the only authority I remember having any bearing on this point of the case, and showing what would be taken to be included.

Even, however, if it were so, I think that the "swift and simple" provisions of the Indian Legislature has swept away *Pigot's case* by s. 37 of the Contract Act (*reads*).

(1) 14 M. & W, 47
(2) 13 M. & W., 343.
(3) 4 T. R., 320.
(4) 5 B. L R, 103.
(5) 11 M. & W., 778.

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So far as I could discover, and on *Davidson* v. *Cooper* (5), there is little doubt left, as there was there a verdict, on the plea of non-assumpsit, that the doctrine is not part of the the law of evidence, but of substantive law; if it were, however, matter of evidence, the Evidence Act would have equally destroyed it.

Attorneys for the plaintiffs: Messrs. *Sen* and *Farr*.

Attorneys for the defendant: Messrs. *Remfry* and *Rogers*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877 *Dec.* 3.

GOSSAIN DASS CHUNDER (DEFENDANT) *v.* ISSUR CHUNDER NATH (PLAINTIFF).*

Title—Adverse Possession—Limitation.

Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer.

Semble.—Such title may be transferred to a third person whilst it is in course of acquisition and before it has been perfected by possession.

Suits for possession distinguished from suits for declaration of a particular title.

Where a plaintiff seeks to recover possession of property of which he has been dispossessed, and bases his claim on the ground of purchase, and also upon the ground of a twelve years' possessory title, he is entitled to succeed if he proves his possession, even if he fails to prove his purchase.

IN this case the plaintiff sued to recover possession of a room and the use of a staircase in an undivided dwelling. He alleged that the house in question was the property of the defendant's maternal grandfather; that the defendant possessed half of the house, and that the other half was in the possession of Bhugobutty Dassia, the defendant's aunt; that the defendant sold his half share to the plaintiff's brother in the year 1850; that

* Appeal under cl. 15 of the Letters Patent, against the decree of R. C. Mitter, J, dated the 6th February 1877, made in Special Appeal, No 2030 of 1876, from the order of A. J. R. Bainbridge, Esq., Judge of East Burdwan, dated 29th July 1876, reversing the order of Baboo Promothonath Banerjee, Moonsiff of Kutwah, dated the 30th November 1875.

this half of the house fell to the share of the plaintiff at the time of partition with his brothers, and that the defendant, on the allegation of a purchase of Bhugobutty Dassia's half share, dispossessed the plaintiff of the room and staircase, the subject of the suit.

Baboo *Kassikant Sein* for the appellant.

Baboo *Sreenath Dass* for the respondent.

GARTH, C.J.—We think there is no ground for this appeal. The plaintiff sued to recover possession of certain rooms in a house, the whole of which he admits to have once belonged to the defendant, but which he says were sold by the defendant to his (the plaintiff's) brother in the year 1857 or 1858, and afterwards fell to the share of the plaintiff in a partition which took place between him and his brother many years ago.

The evidence of the purchase of the property from the defendant was so weak that it was rejected altogether by the Munsif (who found in the defendant's favour) and not relied upon by the District Judge (who reversed the Munsif's judgment, and found in favour of the plaintiff). This judgment of the District Judge is based upon the ground that, although the plaintiff may not have legally established the purchase from the defendant in 1857, he has proved that he has been in possession of the property in question for upwards of twelve years, and this is in fact admitted by the defendant, whose case is, that during that time the plaintiff paid rent to the defendant's mother's sister.

The District Judge, under these circumstances, considered, that the plaintiff had made out a *primâ facie* case, by showing that he had been in possession for upwards of twelve years, and that the onus of proving that the plaintiff paid rent during that time, as alleged by the defendant, was upon the defendant. He has further found that, notwithstanding the purchase of the property by the plaintiff was not established, the plaintiff was entitled to a decree for possession upon the strength of his twelve years' possession.

The learned Judge in this Court was of opinion that the District Judge was right in so holding, and we quite agree with him.

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The plaintiff's case in the first instance was founded not only upon the fact of purchase from the defendant by the plaintiff's brother, but also upon his long possession of the property for upwards of twelve years. The purchase he failed to prove, but the twelve years' possession was established, not only by the plaintiff's evidence, but by the defendant's own admission. It is true that this admission was accompanied by the counterstatement by the defendant, that during the twelve years the plaintiff had paid rent to the defendant's aunt, but the onus of proving this statement was upon the defendant, and he entirely failed to prove it.

We have, therefore, a possession by the plaintiff established for upwards of twelve years before the defendant's dispossession, and there is ample authority that such continuous possession for upwards of twelve years not only (in the language of the Privy Council in the case of *Gunga Gobind Mundul* v. *Collector of the 24-Pergunnahs* (1) bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor.

The construction which this Court has given to the law thus laid down by the Privy Council is not only that a twelve years' possession by a wrong-doer extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer—see *Amrunnissa Begum* v. *Umar Khan* (2) and *Ram Lochun Chuckerbutty* v. *Ram Soonder Chuckerbutty* (3); and this Court has gone still further, because it has held that the title of the wrong-doer can be transferred to a third person whilst it is in course of acquisition, and before it has been perfected by a twelve years' possession—see *Brindabun Chunder Roy* v. *Tarachand Bandopadhya* (4). Whether the law as laid down by the Privy Council was meant to have this extended operation may perhaps be doubted, but such a construction of it tends to convenience in this country, and we are certainly not disposed to question its correctness as applied to the present case.

It was strongly contended by the appellant that the plaintiff's suit ought not to have been decreed, because he did not estab-

(1) 11 Moore's I. A., 345.

(2) 8. B. L. R, 540, S. C., 17 W. R, 119.

(3) 20 W. R., 104.

(4) 11 B. L. R., 237, 20 W. R., 114.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877
Nov. 21.

KALI KISHORE ROY (DEFENDANT) *v.* DHUNUNJOY ROY (PLAINTIFF).*

Practice—Right of Appellant (respondent in lower Appellate Court) to prefer Appeal—Act VIII of 1859, *s.* 119—*Suit by Hindu excluded from Joint Family Property—Limitation—Act IX of* 1871, *Sched.* II, *arts.* 127, 143.

An appellant, who was respondent in a lower Court of appeal, is not precluded, by reason of his non-appearance in such Court, from prefering an appeal to the High Court.

In a suit by a Hindu excluded from joint family property, to enforce a right to a share therein, brought before the 1st of October 1877, the period of limitation must be computed under art. 127, and not under art. 143, of Sched. II of Act IX of 1871.

THE facts are sufficiently stated in the judgment.

Baboo *Nilmadhub Bose* for the appellant.

Baboo *Porankristo Bisuas* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J. (BIRCH, J., concurring).—A preliminary objection has been taken to the hearing of this appeal, that as the present appellant, who was the respondent in the Court below, did not then appear, he is not entitled to be heard in this Court; and s. 119 of the Code of Civil Procedure has been relied upon as an authority for that position. No case showing that s. 119 applies to such a case as the present has been cited; and looking at the language of the section, it appears to us to apply only to the case of a defendant who does not appear in the Court of first instance, and not to that of a respondent who does not appear in a lower Court of appeal. Moreover, we find that a

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 30th of May 1877, in Special Appeal No. 39 of 1877, from the decree of C. B. Garrett, Esq., Judge of Dacca, dated 23rd October 1876, reversing the decree of Baboo Chundee Churn Sen, Second Munsif of Manikgunge, dated the 2nd December, 1875.

Full Bench of the Bombay High Court, in the case of *Ramshet* v. *Balkrishna* (1), has decided that a special appeal lies where the respondent did not appear in the first appellate Court, and that s. 119 does not apply to such a case; and we also find that in two cases before this Court,—one the case of *Omda Bibee* v. *Acourie Sing* (2), decided by Mr. Justice Jackson, and the other the case of *Tara Chand Ghose* v. *Anund Chunder Chowdhry* (3), decided by Mr. Justice Macpherson,—the same point has been ruled in the same way.

These authorities being quite in accordance with our own view, we consider that this preliminary point is untenable, and we proceed to decide the appeal upon the merits.

If we had only to consider the grounds upon which Mr. Justice Ainslie's judgment appears to have proceeded, we should have felt some doubt as to whether we could altogether agree with him. But there is a very important point which Mr. Justice Ainslie did not find it necessary to enter upon, which appears to us to disclose a very serious error of law which has pervaded this case from its commencement

The plaintiff, who is a Hindu, claimed a four-anna share in a joint family property, of which he admitted that the defendant was one of the co-sharers; and he alleged that he had been excluded from his share by the defendant. The defendant, on the other hand, claimed the whole talook as his own, denying that the plaintiff had any share in it.

It seems to have escaped the attention of the Courts below that if the plaintiff were right upon the merits,—that is, if he were entitled to the four annas share which he claimed, and had in fact been excluded from it by the defendant,—the clause in the Limitation Act of 1871, which would be applicable to the case, would not be the ordinary one of twelve years under art. 143 of the second schedule, but the 127th article of that schedule, which provides for the case of a Hindu, excluded from joint family property, seeking to enforce a right to his share. That article provides that the period of limitation shall be twelve years, not from the time of the plaintiff's exclusion, but twelve years from the time when the plaintiff claims and is refused

(1) 6 Bom H C. Rep., A C., 161. (2) 7 W R., 425. (3) 10 W. R., 450.

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his share. Consequently, if a plaintiff has been excluded for fifty years, and he then claims his share and is refused, he would have twelve years from the time of such refusal to bring his suit; or, in other words, he would have sixty-two years from the time of his exclusion; and if he never claims or is refused, the period within which he may bring his suit appears to be indefinite. This apparent inadvertence has been rectified in the present Limitation Act.

Now in this case the Munsif, instead of dealing with the question of limitation under art. 127, has raised an issue, "whether or not the plaintiff had been in possession of the disputed share of talook Mahadeb Rai at any time within twelve years next immediately before the institution of the suit." This evidently was an error of law. The Munsif then found upon the merits in favour of the plaintiff, and decreed his claim. The District Judge upon appeal says that he is disposed to agree with the Munsif as regards the merits of the case, at least, that is what we understand him to mean. His words are: "The Munsif seems to have thought the plaintiff's case very plain, and decreed it. Now I agree so far, that it does appear that there is a just claim; but at the same time I do not think that the evidence on which the Munsif has relied is nearly as strong as he thinks." He goes on to comment upon the evidence, and finds that there is not sufficient proof that the plaintiff had been in possession of his share within twelve years before suit. He then, at the instance of the plaintiff, adjourns the case, in order that the defendant himself might be examined, and having heard his evidence, he says: "I see no reason to change the view I formerly took of the case—namely, that the plaintiff has failed to prove that he was in possession within twelve years before the date of suit;" and then he concludes his judgment in this way:—"It lies upon the plaintiff to prove that he was in possession within twelve years of the date of suit, and I am of opinion that, as he has entirely failed to show this, his suit must be dimissed." It is clear, therefore, from the way in which the issue as to limitation has been dealt with by both the lower Courts, that neither the Munsif nor the Judge was aware that art. 127 of the second schedule applied to a case of this kind,

and as this error has pervaded the whole of the proceedings from the first, the proper course will be to send the case back for re-trial to the Court of first instance.

The attention of the Munsif must be drawn to the fact that if the plaintiff is entitled upon the merits to any share in this joint property, and has at any time been excluded from it (which appears to have been the Munsif's finding on the trial), the plaintiff would have twelve years to bring his suit, not from the time of his exclusion, but from the time when he claimed and was refused his share, and if he has never claimed or been refused his share, then he might bring his suit at any time. The Munsif will frame a fresh issue or issues on the point of limitation, having regard to the judgment of this Court; and will re-try the case upon such issue or issues, both parties being at liberty to adduce further evidence upon the points so raised. In case of an appeal from the Munsif, the District Judge will, of course, be at liberty to re-hear the whole case upon the merits. The costs will abide the event.

Case remanded.

Before Mr. Justice Markby and Mr. Justice Prinsep.

MONOHUR DOSS (PLAINTIFF) *v.* McNAGHTEN (ONE OF THE DEFENDANTS).*

1877 *Aug.* 20.

Indigo Factories—Mortgage—Liability of Creditor of Factory—Lien by Custom.

A sold to *B*, the proprietor of an indigo concern, of which *C* was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale and after the seed had been planted, *C*, under a decree on his mortgage, obtained possession of *B's* factory. In a suit by *A* against *B* and *C* for the price of the indigo seed, *Held* that, in the absence of any agreement by *C* to pay the debts of *B*, *C* could not be held liable.

There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debt of the factory.

* Special Appeal, No. 1853 of 1876, against the decree of E. S. Mosley, Esq., Officiating Judge of Zillah Bhagulpore, dated the 6th of June 1876, affirming the decree of Baboo Mothura Nath Gupta, First Subordinate Judge of that district, dated the 25th of November 1875.

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THIS was a suit for the recovery of Rs. 2,563-12, the value of certain bags of indigo seed. The plaint also asked for the realization of the money due by the sale of the prepared indigo cakes, the product of the seeds, or for a declaration of the plaintiff's right to a charge on the cakes in accordance, as it alleged, with the practice of indigo business. The seed was sold by the plaintiff to the defendant Fitzpatrick, the proprietor of the Paigampore Factory. The evidence of such sale was a "sata," or written agreement, which, however, contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. While the crop was still on the ground, the defendant McNaghten took possession of the factory under a mortgage decree obtained against the defendant Fitzpatrick. The Court of first instance dismissed the plaintiff's claim as against the defendant McNaghten, on the ground that there was no agreement, express or implied, that he should be liable for the debts of his mortgagor The lower Appellate Court upheld this decision, and the plaintiff preferred a special appeal to the High Court.

Mr. *J. D. Bell* (with him Baboo *Jodu Nath Roy*) for the appellant—The assignee of the indigo concern can be made liable for the price of the indigo seed. A mortgagee in possession is like an assignee in bankruptcy. Here the mortgagee has realized the advantage from the crop, the outturn of seeds sold to his mortgagor, and is, therefore, liable for the price: *Kearnes* v. *Bhawani Charan Mitter* (1). The indigo crop being clearly for the benefit of both mortgagee and mortgagor, the cost of production is a charge on the factory, not a personal debt. The mortgagee takes subject to encumbrances: Macpherson on Mortgages, 109; see also an unreported case, No. 51 of 1874, Kemp and Birch, JJ., and *Jowadunessa Satudai Khandan* v. *Jhaman Lall Misser* (2).

Mr. *Fergusson* for the respondents.—Unless the assignee has notice of the debt, he is not bound. The assignee must be found with some knowledge.

Mr. *Bell* in reply.

(1) B L R, Sup, Vol, Part 1, 54 (2) 23 W R, 158.

The judgment of the Court was delivered by—

MARKBY, J.—In this case the plaintiff is a person who supplied seed to an indigo factory. While that seed was in the ground the mortgagee of the owner of the factory took possession of it, and I assume that he also took the crop which was produced by the seed. The person who sold the seed is plaintiff in this suit, and he sues the mortgagee, Mr. McNaghten, and also the mortgagor, Mr. Fitzpatrick, to recover the value of the seed. Both the Courts below have held that the mortgagor is liable, but that the mortgagee is not The plaintiff appeals.

Now it is not necessary to advert to the exact terms of the plaint, as Mr. Bell, in arguing for the plaintiff, says, that he is not bound by the precise terms of the plaint, and has argued the general question whether, under these circumstances, the mortgagee in possession can be made liable for the price of the seed. I think he has failed to show that he can be made so liable.

Before considering the Full Bench decision that has been referred to, I will clear the case of one preliminary point,—namely, that there is not in this case any pledge of the crop of indigo which was grown out of this seed by the owner of the factory to the plaintiff. Mr. Bell read the "*sata*" to us, and it does not seem to us to constitute any such pledge. Therefore, that distinguishes the case from two manuscript judgments which were read to us in regular appeal, No. 51 of 1874, and the case of *Jouadunessa Satudai Khandan* v. *Jhaman Lall Misser* (1).

But then it is said that, quite independently of any arrangement of that kind between the seller of the seed and the owner of the factory, there is in the case of an indigo factory a right to recover the price of the seed from the mortgagee in possession.

Now I think the Full Bench ruling which has been quoted lays down two things. I think we must now take it to be the law of this country that there is no lien by custom or otherwise upon the factory or upon the produce in respect of any debt of the factory. And I think that that decision further lays down that the purchaser of an indigo factory is liable only for those debts which, as between himself and the vendor, he has agreed to pay. At page 59, Bengal Law Reports, Full Bench Rulings, Part I,

(2) 23 W. R., 158.

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it is said:—"Looking to general principle, as well as to the authorities in the late Sudder Court, and particularly *E. D. De Sarun* v. *Wooma Churn Seth* (1), there seems no ground whatever for saying that the back rents of a firm, the lease of which had expired before the sale of the factory, can be considered as a lien on the factory and other property belonging thereto in the hands of a purchaser." No doubt that particular subject of remark is back rent, but I think the same principle applies to any other debts of the factory. And further on it is said: "We have already seen that if, as in the present case, the purchaser, by the contract of sale, takes over the assets of the factory, and agrees to pay the debts, the creditors may adopt and avail themselves of the contract in their favour. It is hardly suggested that there is any local or special custom which carries the liability of the purchaser further than this. Indeed, any such custom would be certainly at variance with the general law applying to the case of in-coming and out-going partners. The rule applying to such cases is stated in Lindley on Partnership, Vol. I, page 314, ed. 1860. A person, who is admitted as a partner into an existing firm, does not, by his entry, become liable to the creditors of the firm for anything done before he became a partner."

Now there is, undoubtedly, one decision of the Sudder Court which goes so far as to say that there is a lien on the factory. And one of the learned Judges who gave his opinion in the Full Bench case seemed still to think that there was a lien on the factory. But I think that only brings out the decision of the majority of the Court all the more strongly. It appears to me clear that the majority lay down that, according to law of this country, there is no such lien. Then how does the case stand? It is simply a question—did the mortgagee, by any contract between himself and the mortgagor, make himself liable for this debt? There is no evidence, as far as I can see, nor has any been suggested, that the mortgagee ever undertook to pay this debt. It would be exceedingly unlikely that the mortgagee should agree to pay the debts of the factory. His position is quite different from that of a purchaser. He does not mean to retain the factory in his own

(1) S. D. A., 1858, p. 1814.

hands as the purchaser does; what he intends to do is merely to work out the debt due to himself. Mr. Bell argued that the position of a mortgagee is stronger than that of a purchaser. I do not see any principle under which a mortgagee can be made liable for such a claim as this unless upon the principle laid down by the Full Bench that he has undertaken to do so.

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Therefore, on these grounds, I think the decision of the Court below was right, and this special appeal ought to be dismissed with costs.

PRINSEP J.—I am of the same opinion.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

CHUNDER COOMAR ROY AND OTHERS (DECREE-HOLDERS) v. BHOGOBUTTY PROSONNO ROY AND ANOTHER (JUDGMENT-DEBTOR).*

1877 *Sept.* 11.

Limitation Act (IX of 1871), *Sched. II, art.* 167—"*Applying to enforce the Decree*"—*Application* "*to keep the Decree in force*"—*Act VIII of* 1859, *s.* 212.

The words "applying to enforce the decree," in Act IX of 1871, Sched. II, art. 167, mean the application (under s. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last named application, obtain execution of his decree.

THE facts of this case and the authorities cited appear in the judgment of Ainslie, J., referring the case to a Full Bench.

AINSLIE, J.—On the 22nd February 1875, the decree-holder applied, under s. 212, Act VIII of 1859, to put his decree

* Miscellaneous Regular Appeal, No. 386 of 1876, against the order of H. T. Prinsep., Esq, Judge of Zillah Hooghly, dated the 28th of August 1876.

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into force. The Judge below holds that the application must be dismissed under the Limitation Act, Sched II, art. 167, cl. 5, because the last application for execution under s. 212 having been filed on the 21st December 1871, notice under s. 216 was issued on the 17th January 1872, and the time limited for renewing the application is three years, commencing from that date.

This appeal is brought to have it determined whether applications subsequent to the 21st December 1871, and in furtherance of the proceedings then set on foot, are not applications to enforce, or keep in force, the decree. There was an application for attachment of property made, after issue of notice under s. 216, on 1st February 1872 A writ of attachment was issued on 16th, and returned with certificate of execution on the 28th idem, and on the 29th an order was recorded requiring the judgment-creditor to deposit the costs of proclamation of sale within seven days. Up to this time there was nothing that can, on any construction, come within the meaning of the words "application to enforce or keep the decree in force" done within three years next before 22nd February 1875. The further proceedings were: payment into Court of the costs of proclamation of sale by *challan* on the 4th March 1872; order for sale on 20th April, and proclamation accordingly; sale on that date; and application on the following day by the decree-holder to take the sale proceeds out of Court. This last I cannot hold to be an appplication to enforce or keep the decree in force. As far as the debtor was concerned, the proceedings had terminated—*Maharajah of Burdwan* v. *Luckee Monee Debee* (1), *Juggut Mohinee Dibee* v. *Ram Chand Ghose* (2); and the money was held in deposit on account of the decree-holder, who could leave it lying in the treasury or take it out at his own convenience. If this is to be deemed an application within the meaning of the clause, it is in the power of the creditor to extend his time by not drawing money which has completely passed from the control of the debtor, and is in fact his own.

There remains the payment of money into Court for the purpose of causing issue of proclamation of sale under the

(1) 8 W. R., 359. (2) 9. W. R., 100.

order of 29th February. The first question is, whether this was an application at all; the next, whether it was one to enforce or keep the decree in force. I think it must be taken that the *challan* by which money was tendered for the costs of issue of proclamation of sale, when taken in connection with the original application to execute the decree by attachment and sale, and the attachment effected and order thereupon, was an application to the Court to proceed with the execution of the decree; it is therefore necessary to go on and try the second question.

The learned Legal Remembrancer, who appeared for the appellant, pointed out the difference of the words used in the first and third columns of the schedule under art. 167. As to the entry in the first column, headed "description of application," it is beyond doubt that the words "for the execution, &c.," apply to applications under s. 212. It was contended that if the words "applying to the Court to enforce" are meant to be restricted to such applications, the language in the third column would have followed the form used in the first column, and have run as follows– or to the same effect—" or (when the application next hereinafter mentioned has been made) the date of applying to the Court under s. 212, Code of Civil Procedure, to enforce the decree, or otherwise applying to keep it in force."

In the parenthesis in the schedule, the word "application" is used in the singular, but it is manifest that more than one kind of application is contemplated. The words "to keep in force" do not apply to an application under s. 212. They may be intended to apply to such applications as those suggested by Mr Justice Markby in the case of *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (1), but with that I am not now concerned. The use of the singular is, therefore, in no way inconsistent with a construction of the words "applying to enforce," which shall include more than one form of application. Moreover, the absence of such reference to the section of the Code as occurs in the next following clause of the same article, and the change of expression from "application for execution" to "applying to enforce," may reasonably be presumed to be

(1) 25 W. R., 546.

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intentional and to have a purpose, and the construction contended for by Mr. Bell certainly gives effect to the varied form of expression. It cannot be said that the position of the clauses indicates a restricted construction of the earlier clause, inasmuch as the later clause provides for an extension of time by reference to a proceeding of later date than an application for execution, for this is to ignore the application to keep in force which, apparently, may be many months, possibly three years, later than either the application to execute under s 212, or the notice under s. 216.

The law of limitation being a Statute in restraint of right must, in case of doubt, be construed favourably to the rights restrained, and it seems to me that any application in furtherance of an application to put a decree into execution may be held to be an application to enforce the decree. If it becomes necessary to apply to the Court to take some further step in execution proceedings already started, that is really an application to enforce.

The reported cases on this article of the schedule brought to my notice are not numerous; and of these only two directly bear upon the present question. These are the cases of *Faez Buksh Chowdhry* v. *Sadul Ali Khan* (1), decided by Jackson and McDonell JJ., and *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (2), by Markby and McDonell, JJ.

The other cases brought before me were:—*Gouree Sunkur Tribedee* v. *Arman Ali Chowdhry* (3), *Eshan Chunder Bose* v *Prannath Nag* (4), *Baboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (5), *Shaikh Subhan Ali* v. *Shaikh Sufdar Ali* (6), *Abdool Hekim* v. *Shaikh Assentoollah* (7), *Jibhai Mahipati* v. *Parbhu Bapu* (8). I will examine these first:—

Gouree Sunkur Tribedee v. *Arman Ali Chowdhry* (3) was decided by Couch, C.J. and Jackson, J. This case only decides that as the application relied on was not an application under s. 212, it did not serve to keep the decree in force.

(1) 23 W. R., 282.
(2) 25 W. R, 546.
(3) 21 W. R., 309.
(4) 14 B. L. R., 143; S. C., 22 W. R., 512.
(5) 23 W. R., 183
(6) 24 W. R., 227.
(7) 25 W. R, 94.
(8) I L. R., 1 Bomb., 59.

It was said that the provision in art. No. 167 must be held to require an application to be in accordance with s. 212. That is the least that must be done, supposing that the decisions about *bonâ fides* should be held to be not applicable now. All that can be gathered from the report is that the decree-holder was probably relying on some informal application for execution, and not on an application following and subsidiary to a regular application under s. 212. The report does not state the facts. But this is the view of the case taken in the Bombay case to be referred to hereafter.

The next case, *Eshan Chunder Bose* v. *Prannath Nag* (1), was decided by a Full Bench. The case was referred to a Full Bench by Jackson and McDonell, JJ. In the referring order, Mr. Jackson said that it had been pressed on them that because every application made after the period of limitation prescribed for it must fail, therefore, conversely, every application made within that period is a good application to stop limitation running; and that another Bench (Markby and Mitter, JJ.) had held that this is now the law, and that all questions of *bonâ fides* are excluded. Pointing out the resulting unlimited delays that might be brought about, he asked for a decision on the question of *bonâ fides*. The Full Bench unanimously held that the provisions of the present law are absolute and irrespective of any question of *bonâ fides*. I may observe (though it refers more properly to an earlier part of this order) that Mr. Justice Jackson expressly rests his judgment on the ground that the silence of the Legistature on the question of *bonâ fides* must be taken to have been intentional.

The next case cited, *Booboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (2), is scarcely connected with the present question in any way, and I shall pass it by as immaterial.

Shaikh Subhan Ali v. *Shaikh Sufdar Ali* (3). This case also is unimportant. Apparently there was nothing which could be called an application after the issue of notice under s. 216 on the 15th April 1871, up to 20th July 1874, when the fresh application for execution was put in, though the former case was not struck off the file till 24th August 1871.

(1) 14 B. L R, 143, S. C., 22 W. R., 512.

(2) 23 W. R., 183.

(3) 24 W. R., 227.

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Abdool Hekim v. *Shaikh Assentoollah* (1). The former application was on 31st October 1868; notice was issued on the 20th November 1868, and the new application was on the 28th November 1871. A petition of 12th December 1868 was relied upon as sufficient to save the case from the operation of the statute, but this was rejected on the ground that the decree-holder did not thereby apply to enforce execution; he simply prayed that the matter of the execution applied for on 31st October 1868 should be disposed of along with an application for an execution he had made in another suit.

Jibhai Mahipati v. *Parbhu Bapu* (2). The last application for execution was in February 1868. The proceedings thereon lasted till 10th September 1871, when they were brought to a close by an order setting out that all the money due had been received, except Rs. 20-13-3, which there was then no prospect of realizing. On the 30th September 1871, a petition was put in, which was afterwards relied on as bringing the next application for execution made on 19th October 1872 within time. The Court citing the Calcutta case—*Gouree Sunker Tribedee* v. *Arman Ali Chowdhry* (3)—held that it was not an application to execute at all, and was itself out of time.

I now come to the two cases directly on the question before me. The second merely follows the first, and it will be convenient to notice it first. In *Rajah Nilmoney Singh Deo* v. *Nilcomul Tuppadar* (4), the application to execute was made on 29th December 1873; the last previous application was on 10th September 1870 A notice under s. 216 issued on this; the date is not given, but it seems to have been admitted that it was not within three years. It was suggested that further proceedings might have been taken, but this was not enquired into. Mr. Justice Markby, in delivering judgment, said:—"The case of *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (5) decides that, under the new law of limitation, when proceedings have been had subsequent to the application to execute the decree and to the issue of notice, limitation does not

(1) 25 W. R., 94.
(2) I. L. R., 1 Bomb., 59.
(3) 21 W. R., 309
(4) 25 W. R., 546
(5) 23 W. R., 282.

run from the date of any such subsequent proceedings, but only from the date of the first application to execute the decree, or from the notice, as the case may be. That is a decision of a Division Bench of this Court in which Mr. Justice McDonell was a party, and I should not feel justified in departing from it.

This brings me to the last case to be noted, *Faez Buksh Chowdhry* v. *Sadut Ali Khan* (1), decided by Jackson and McDonell, JJ., which governed the case just cited. The application before the Court was in September 1873, the last preceding one in August 1870. It was urged that, under that application, proceedings had been taken, property sold, and money recovered; but it was held that "the Act does not allow limitation to run from the date of such proceedings, but only from the date of the application." Why the Court held the applications, to enforce a decree mentioned in art. 167, cl. 4, to be limited, to applications under s. 212, is not stated.

That the decisions as far as they go run one way must be admitted, but the principle of construction has been discussed in none of them; and with the greatest respect for the example of my learned brother Markby, I think I shall not be uselessly wasting the time of the Court by placing the question, which it is of immense importance to get finally settled, before a Full Bench.

The applications I refer to as subsidiary and in furtherance of the enforcement of a decree, and which appear to me to be applications to enforce within the meaning of cl. 4, art. 167, are such applications as for attachment after issue of notice; for proclamation of sale after attachment; for further proclamation after temporary stay of proceedings; in short, all applications the expressed purport of which is to procure something to be done by the Court which is necessary to carry into effect, give force to, or enforce the primary application for execution under s. 212. I use the words *expressed purport* designedly to avoid any doubt whether I am not coming into conflict with the Full Bench decis on in the case of *Eshan Chunder Bose* v. *Prannath Nag* (2). I do not mean to raise any question of the *bonâ fides* of the petitioning decree-holders, if the terms of any application subsi-

(1) 23 W R. 282 (2) 14 B L R, 143, S. C, 22 W. R., 512

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diary to and in furtherance of an application under s. 212 set out and ask for something which is material to the progress of the execution. As at present advised, I believe it to be a sufficient application under the limitation law.

The question, then, may be stated in the following terms:—Under the terms of cl. 4, art 167, Sched II of the Limitation Law, is not an application to the Court to have something done for the purpose of carrying on and giving effect to a pending application for execution of a decree made under s. 212 of the Code of Civil Procedure an application from the date of which a fresh period of limitation runs?

It is scarcely necessary to say, as the order of reference implies it, that, in my opinion, the question of limitation was open for consideration by the Judge, and that an admission by one of two co-debtors could not operate to prevent his giving effect to cl. 4, art. 167, Sched. II of the Limitation Law.

MORRIS, J.—I think that the question raised by my learned colleague as to the effect of cl. 4, art. 167, Sched. II of the Limitation Act, should very properly be referred for the decision of a Full Bench of this Court.

The Senior Government Pleader (Baboo *Annoda Persad Bannerjee*) and Baboo *Srinath Dass* for the appellants.

Baboo *Mohini Mohun Roy* and Baboo *Juggut Chunder Bannerjee* for the respondents.

The following judgments were delivered by the Full Bench:—

GARTH, C. J.—We are of opinion that "applying to enforce the decree" in art. 167 means the application (under s. 212, Code of Civil Procedure or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

But we also think that some meaning must be given to the alternative expression "keep in force" occurring in the same article, and that consequently in cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter*

"to keep the decree in force" may, within three years from the date of such last named application, obtain execution of his decree.

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AINSLIE, J.—I accept the decision of my learned colleagues as the proper answer to the question put.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

MADHUB CHUNDER GIREE (DEFENDANT) *v.* SHAM CHAND GIREE (PLAINTIFF)*

1877 *Nov.* 24.

IN THE MATTER OF THE PETITION OF MADHUB CHUNDER GIREE.

Superintendence of High Court—24 and 25 Vict., c. 104, s. 15— Act XXIII of 1861, ss. 26 and 35.

The High Court will not, under s. 15 of 24 and 25 Vict., c. 104, interfere with judgments, decrees, or orders of a lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers.

Where the appellant has a remedy by regular suit, the Court is reluctant to interfere.

THIS was a suit under s. 15 of Act XIV of 1859 for recovery of possession of certain immoveable property. The defendant was formerly Mohunt of the Tarokessur, and as such was in possession of the temple and its appurtenances, including the official residence of the Mohunt, and of large landed estates, the property of the endowment, as also of some other landed property, the private and individual property of the Mohunt. On the 24th November 1873 the defendant was convicted by the Court of Sessions of the offence of adultery, and was sentenced to three years' imprisonment. On the defendant's conviction and imprisonment, the plaintiff, who was at the time the defendant's senior disciple, took possession of the office of Mohunt, and remained in possession not only throughout the three years' imprisonment of the defendant

* Rule No. 1023 of 1877, against the decree of J. P. Grant, Esq., District Judge of Hooghly, dated 28th August 1877.

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(which expired in the latter part of November 1876), but until the 22nd December following, on which date the defendant re-entered the temple premises, and resumed possession of them and of the landed properties. The re-entry was complained of by the plaintiff as an illegal act, and he then brought a suit, to reinstate himself under Act XIV of 1859, in the Court of the District Judge of Hooghly. The plaintiff's contention was that he was without his consent unlawfully dispossessed during a temporary absence, and that the defendant re-entered by force; and a number of cases were cited in his favour including the case of *Protab Chunder Burrooah* v. *Ranee Kyanteswarree Dabee* (1), which laid down that the remedy afforded by s. 15 of Act XIV of 1859 was a special one contrived to discourage lawless acts of ouster by depriving the dispossessor of the privilege of proving a better title.

The defendant denied the forcible entry, stating that he returned peaceably and at the invitation of the plaintiff; and further pleaded that, by certain arrangements made between him and the plaintiff when defendant's conviction seemed probable, the plaintiff was constituted the defendant's agent, and held possession throughout only as such; and, therefore, that his possession was that of his principal, who, it was contended, was entitled to eject the plaintiff—*Hansey* v. *Brydges* (2). As to the particular terms of s. 15, it was argued that, as the words "notwithstanding any other title" are used, the issue was not limited to bare possession, but to the possessory title, and that therefore a person sued under that section might prove such title; and as to the words "otherwise than by due course of law," it was maintained that they only meant "illegally," and that there was nothing illegal in a man entering upon his own property. It was further contended that the intention of the legislature that title to possession was maintainable under this section was manifest, by comparing it and the possessory section of the Criminal Procedure Code with Act IV of 1840, the two-fold provisions of which are reproduced one in each of the subsequent laws, the criminal law providing for maintenance of *de facto* possession,

(1) 2 W. R., 250. (2) M. and W., 442.

while the limitation law allowed the title to possession to be proved lastly. In support of these arguments the following cases were quoted by the defendant: *Protab Chunder Burrooah* v. *Ranee Kyanteswarree Dabee* (1); *Bagram* v. *The Collector of Bulloah* (2); and *In the matter of the Petition of Sutherland* (3).

The District Judge, Mr. J. P. Grant, decided that all the questions put in issue, expect those relating to the anterior possession of the plaintiff, his dispossession by the defendant, and the manner thereof, were irrelevant; and ordered that the plaintiff should recover possession.

On the 3rd September 1877, the defendant applied to the High Court by petition, praying that the judgment of the Judge of Hooghly should be set aside, and that he should be directed to try the proper issues involved; and that, in the meantime all proceedings should be stayed, and tne *Advocate-General* obtained a rule calling upon Sham Chand Giree to show cause why the judgment of the District Judge of Hooghly should not be set aside on the ground that the petitioner (the defendant) was entitled to have a decision upon the question raised in the said suit, as to whether or not the possession of the plaintiff was in law the possession of the said petitioner (defendant), and whether that being so, the plaintiff was estopped from setting up an adverse title.

The Standing Counsel (officiating) Mr. *J. D. Bell* (with him Baboo *Girish Chunder Ghose*) appeared to show cause against the rule. He drew attention to s. 26 of Act XXIII of 1861, which absolutely forbade appeals from orders or decisions under Act XIV of 1859, s. 15; and cited *In the matter of Lakhi Kant Bose* (4), in which the High Court decided that, "under s. 15 of 24 and 25 Vict., c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII of 1861." He also contended that the High Court will not interfere in the exercise of its extraordinary jurisdiction when the petitioner

(1) 2 W. R., 250.
(2) W. R., Gap No., 1864, 243.
(3) 9 B. L. R. 229; S. C., 18 W. R., 11.
(4) I. L. R., 1 Calc., 180.

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applying has his remedy by regular suit: *Mahashankar Harishankar* v. *Valibhai Umanji* (1), *In the matter of A. B. Miller* (2), and *Hurrehur Mookerjee* v. *Nobin Chunder Doss* (3).

The learned Counsel then questioned whether s. 15 of the Charter gave power to the High Court to call for the record of a suit already decided, citing *Karim Sheikh* v. *Mukhoda Soondery Dossee* (4), *In the matter of Munnoo Singh* (5), *In the matter of the Petition of Durga Churn Sirkar* (6), and distinguishing the case of *Omar Chund Mahater* v. *the Nawab Nazim of Bengal* (7). He further argued that although a tenant or person claiming under him cannot dispute his lessor's title to demise, yet he may show that, since the demise, the lessor's title has expired, or been duly determined or defeated, or that he had since assigned it by way of sale or otherwise; and that, therefore, he was not estopped from setting up an adverse title: Cole on Ejectment, p. 164.

The *Advocate-General* (officiating) Mr. *Paul*, in support of the rule, contended that the case had not been tried as to the points in issue, and that the Judge was bound to try them, and by not doing so had refused his duty, and thus called for the exercise of the extraordinary jurisdiction of the High Court; and that the Supreme Court had, on several occasions, issued a mandamus compelling a Judge to do his duty when there was no other means of compelling him to do so. The learned *Advocate-General* further contended that the meaning of the section did not apply to the position of the master and servant, and cited in support of the powers of superintendence of the High Court *In the matter of Juggut Chunder Chuckerbutty* (8), *Girdhari Singh* v. *Hurdeo Narain Singh* (9), *In the matter of the Petition of Syed Abdool Ali* (10), *Mussamut Mitna* v. *Syed Fuzl Rub* (11).

The following judgments were delivered:

(1) 6 Bom. H. C. Rep., 174.
(2) 12 W. R., 103.
(3) 20 W. R., 202.
(4) 15 B. L. R., 111, S. C., 23 W. R., 268
(5) 19 W. R., 306
(6) 2 B. L. R., A. C., 165.
(7) 11 W. R., 229.
(8) I. L. R., 2 Calc., 110.
(9) 3 L. R., I. A., 230.
(10) 15 B. L. R, 206.
(11) 15 W. R., P. C., 15

MARKBY, J.—In this case the plaintiff sued to recover possession of certain property under s. 15, Act XIV of 1859. The District Judge gave the plaintiff a decree. The defendant then applied to this Court to set aside that decree under the powers of general superintendence conferred upon it by s. 15 of 24 and 25 Vict., c. 104. Upon that application a rule was issued, calling upon the plaintiff to show cause why the decision of the District Judge should not be set aside, upon the ground that the defendant was entitled to have a decision upon the question whether or no possession of the plaintiff was in law the possession of the defendant, and whether that being so, the plaintiff was estopped from setting up an adverse title.

I am certainly not prepared to say that I agree altogether with the view of the law taken by the District Judge. It would seem to go to the length of laying down that a mere agent, who was put into possession of property by his employer upon his employer's behalf, might, if he chose to deny his employer's right to possession, not only hold the property against his employer, but turn his employer out, even although his employer had committed no breach of the peace, or committed any act of which the agent could complain other than that of returning upon his own property. I do not say, that is what has actually occurred in this case; but the refusal of the District Judge to consider the terms under which the plaintiff obtained and held possession seems to be based upon considerations which go to that length.

But I do not think it follows, because I do not agree with the view of the law taken by the Court below, that we ought, in such a case as this, to interfere under the special powers of superintendence conferred upon us by s. 15 of 24 and 25 Vict., c. 104. Whatever difficulties there may be in the construction of this section, I think it is quite clear that every erroneous decision is not to be set right under the powers conferred by it. For if every erroneous decision can be set right under it, then every decision may be questioned under it upon grounds both of fact and law. The result would be that no Court subordinate to the High Court would be capable of giving an unappealable decision upon any question whatsoever. No one could seriously

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maintain such a proposition as that; and it is, therefore, necessary to consider further, whether, admitting the decision of the Court below to be questionable, this Court ought to interefere in order to nullify that decision.

There being no limitation expressed in the language of the section itself which confers these extraordinary powers, the only limitation upon the exercise of these powers is the discretion of the Court to which the application is made, and such principles as the Judges have themselves laid down for their own guidance in the exercise of that discretion.

There is some difficulty in extracting any very clear rules from the decisions, and it is not surprising that the decisions upon such a subject are not wholly uniform. There would always naturally be a strong inclination to interfere where an erroneous decision has been brought to the notice of the Court, and the choice lies between two evils—between leaving an erroneous decision to have its effects, and between weakening to an extent which would be most injurious to the powers of the subordinate Courts. One consideration, however, has always, as a matter of course it ought, weighed strongly with this Court,—namely whether the party aggrieved will be remediless if the superintending Court refuses to interfere. If he has another remedy provided him by the law, his claim to the extraordinary interference of the Court is much weakened, even though the remedy may not be quite complete. I am not prepared to say that in this case the remedy which the defendant has, by way of regular suit, is complete, but he can bring such a suit, and, if successful, it will go a long way towards preventing any wrong which may have done him by the decision of the District Judge.

Another matter which this Court will always consider is any charge of judicial misconduct in the Court below; and by this I do not mean misconduct of a moral kind only, but an entire misconception by the Court below of the duty which it had to perform. I consider this to be the ground upon which this Court interfered in the case of *Girdhari Singh* v. *Hurdeo Narain Singh* (6). The Subordinate Judge in that case had revoked a previous

(1) 3 L R., I A., 230.

order made by himself upon grounds which he had himself previously overruled, and without any notice to one of the parties interested. But this is a very different case. There was no misconduct here. The District Judge did, no doubt, refuse in this case to consider a question which he was asked to consider, and I think he was wrong in doing so. But he did so upon a careful and deliberate examination of what, according to his view, was his duty in this respect, and after the parties had been fully and patiently heard. There is nothing in this which can be called judicial misconduct in any sense whatever.

On the other hand, it is admitted that the District Judge neither exceeded his jurisdiction nor declined jurisdiction in this case, unless his refusal to consider the question of how the plaintiff came into possession can be so called. But, in my opinion, no determination of the Judge as to the materials upon which he thinks he ought to base his judgment can be called a question of jurisdiction. To refuse to look at a document or to consider an issue tendered arbitrarily, and without assigning any reason, might, under some circumstances, be misconduct, but could not be a refusal of jurisdiction.

Under these circumstances, I think that a case has not been made out for the exercise of the extraordinary powers of the Court, and that the rule ought to be discharged with costs.

MITTER, J.—I am also of the opinion that this rule ought to be discharged with costs. I also concur with my learned colleague that the District Judge is in error in refusing to consider the effect of the alleged *urponnamah*, on the ground that it is not relevant in this enquiry. This document, if established as genuine, might show that the possession of the plaintiff was the possession of a servant on behalf of his master, *viz.*, the defendant. The District Judge is, therefore, wrong in excluding this document wholly from his consideration. The question, therefore, that we have to determine in this rule is, whether, for this error of law, this Court under the provisions of s. 15 of 24 and 25 Vict., c. 104, ought to interfere with the decision of the District Judge.

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It is not disputed that, by s. 26 of Act XXIII of 1861, the decision of the District Judge in this case is final, and cannot be interfered with by way of appeal; and I think it has been now settled by a uniform current of decisions in this Court, that, under s. 15 of 24 and 25 Vict., c. 104, it will not interfere with the judgments, decrees, or orders of the lower Court on the bare ground that they are erroneous in law or are based upon a wrong conclusion of facts. These cases are all collected in a foot-note in page 104 of Volume 1 of the Indian Law Reports (Allahabad Series). An applicant moving the Court to interfere under the extraordinary powers given by this section must establish something more than a mere error of law, or a wrong conclusion on evidence.

In this case I do not think that the petitioner has succeeded in establishing any special ground upon which this Court would be justified in interfering with the judgment of the lower Court, which is admittedly final by the provisions of the Indian Legislature. He has a remedy by a regular suit; and he will have an ample opportunity in that regular suit of establishing the particular fact which the lower Court, in this proceeding he complains, has erroneously declined to enter into. It has been said that if the decision of the lower Court in this case be allowed to stand, he would be compelled to occupy the disadvantageous position of a plaintiff. But it seems to me that, in the investigation of the particular question which he asks the Court to investigate, it makes no difference to him whether he occupies the position of a plaintiff or defendant. The apparent previous possession of the plaintiff being admitted, the applicant must, whether in this proceeding or in a regular suit, show that it was really possession on his behalf.

I think, therefore, that, beyond establishing a bare error of law in the decision of the lower Court, the petitioner in this case has failed to make out any special ground upon which this Court would be inclined to interfere under the provisions of s. 15 of 24 and 25 Vict., c. 104.

Application refused.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

LEELANUND SINGH BAHADOOR (PLAINTIFF) *v.* THAKOOR MUNRUNJUN SINGH AND ANOTHER (DEFENDANTS).*

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Ghatwali Tenure—Grants prior to Permanent Settlement—Reg. VIII of 1793, s. 51, cl. 1—Enhancement of Rent.

Where grants of land had been made prior to the Permanent Settlement on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the services on the part of the zemindar—*Held*, in a suit by the zemindar to enhance the rents, that as long as the ghatwals were able and willing to perform the services, the zemindar had no right to enforce payment of an enhanced rent on the ground that the services were no longer required.

The ghatwals are dependent talookdars within the meaning of Reg. VIII of 1793, and are protected from enhancement by cl. 1 of s. 51 of that Regulation.

THE original suits which gave rise to these appeals were brought by Rajah Leelanund Singh to recover arrears of rent in respect of certain ghatwali taluks situate within his zemindari of Khurukpur, and to have his right declared to enhance the rents of the same, at a rate which the Court might think fit as an equivalent for the ghatwali services which had been rendered unnecessary through the agency of the Government.

The three cases were analogous, and, at the instance of the parties, were tried together. In the judgment will be found a full account and explanation of the origin and nature of ghatwali tenure, as also a resumé of the circumstances which led up to these suits being brought.

In the first suit the plaintiff sought to recover the sum of Rs. 6,965-9-2, principal and interest, being arrears of rent payable in respect of the taluk Kukwara, from the 22nd Falgun 1267 F.S., to the close of 1281 F.S., and to have his right declared to receive rent from 1282 F.S. at the rate of Rs. 11,240 per annum in lieu of the salary of officers, burkundazes and archers, and other expenses which the ghatwals were bound to pay, and which actually they did not pay.

* Regular Appeals, Nos. 250 and 251 of 1885, and 59 of 1856, against the decree of Baboo Mothura Nath Gupto, First Subordinate Judge of Zillah Bhagulpore, dated 15th July 1875.

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On behalf of the plaintiff it was contended that the ghatwali grants in question had been made on condition of the performance of certain police services by the grantees; that these services having been undertaken by the Government in consideration of the plaintiff paying an additional sum of Rs. 10,000 annually, the latter, by reason of such arrangements and in virtue of his right as zemindar, was entitled to an enhanced rent.

The defendants in all three suits denied their liability to pay more than they were bound to pay by the terms of the sanads under which they held their lands.

In the first suit two sanads were filed, the first dated 7th Pous 1183 Fasli, purported to have been granted to the defendants' ancestors, Ranku and Bhyro Singh, by one Captain James Browne. It declared that "from the commencement of the year 1184 Fasli the jama of Taluk Kukwara has been fixed as a mokurari istemrari at Rs. 245-12-5 of the local current coin in the name of Ranku Singh and Bhyro Singh, ghatwals of the aforesaid taluk," stipulated for due payment of the Government rent, and directed the authorities, ministerial officers, and zemindars to "uphold the mokurari and istemrari jama of the said pergunnah, and receive the jama year by year, and not to demand a fraction more." The second sanads, dated 1194 Hijri, and granted to Ranku and Bhyro Singh by Kaja Kadir Ali, the then zemindar, confirm the ghatwals in their office. Similar sanads, dated respectively 2nd of Safar 1194 H.S., and 15th Safar 1209 Hijri, were filed by the defendants in the second and third suits.

On the 15th of July 1875 the Subordinate Judge dismissed all three suits.

The present appeals were from this decree.

The *Advocate-General* (with him Mr. *R. E. Twidale*, Baboo *Unnoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdry* and Moonshee *Mahomed Yusoff*) for the appellant.—In reviewing the cases bearing upon the subject of ghatwali tenure, referred to *Rajah Leelanund Singh* v. *The Bengal Government* (1), *Forbes* v. *Meer Mahomed Tuquee* (2), *Kooldeep Narain Singh* v. *The*

(1) 6 Moore's I. A., 101. (2) 13 Moore's I. A., 138.

Government (1), and *Farquharson* v. *Dwarkanath Singh* (2). He contended that, although the tenants were described as ghatwals, the sanads were not really ghatwali in their nature; that the terms as to watching, &c., were the ordinary terms in Government land agreements. The ghatwals were in the position of mere leaseholders or talukdars, and such being the case, the zemindar had the right of every zemindar to assess his taluks. There has been abatement from the jama payable by the defendants. They are, therefore, not protected under s. 51 of Reg. VIII of 1793; *Meertinjay Shah* v *Baboo Gopal Lal Thakoor* (3). There is no fixed rent within the meaning of Act X of 1859, s. 15. A fixed rent within the meaning of this section is a fixed money-rent with no other incident attached thereto; see *Mahomed Yacoob Hossein* v. *Sheikh Chowdhry Wahid Ali* (4) and *Thakoor Pershad* v. *Nawab Syed Mahomed Baker* (5). The word 'jama' means, according to the Regulations, a rent wholly in money: *Meertinjay Shaw* v. *Baboo Gopal Lal Thakoor* (6). By s. 56 of the Contract Act the engagement between the plaintiff and defendants has become void. The plaintiff was entitled in equity to an enhanced rent.

Mr. *Montriou* (with him Baboo *Chunder Madhub Ghose*, Baboo *Taruck Nath Sen*, and Baboo *Rajendro Nath Bose*) for the respondents.—The only persons really interested in the ghatwali services were the Government, it being the duty of the zemindar to see to the due performance of the services. Over the ghatwals themselves we had little more than a sovereignty. The Rs. 10,600 to be paid annually by the zemindar was in consideration of his being relieved from his duty of supervision. It gave him no equity. The position of a ghatwal is distinct from that of an ordinary tenant; his privileges and status are recognised by the Settlement; see *Roopnarain Deo* v. *Raja Qudir Alee* (7). The jama was that part of the rent which was to be paid in

(1) 11 B. L. R., P. C., 71; 14 Moore's I. A., 247.

(2) 14 Moore's I. A., 259.

(3) 7 Sel. Rep., new ed., 257; old ed, 217.

(4) 4 W. R., Act X Rul., 23.

(5) 8 W. R., 170.

(6) 7 Sel. Rep., new ed., at p. 261; old ed., 217.

(7) 1 Sel. Rep., 28.

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money, there being other conditions forming part of the consideration for the grant. A variation in the number of men to be maintained in accordance with the conditions is not an abatement of the jama within the meaning of s. 51 of Reg. VIII of 1793, for abatement under this section is a mere temporary measure. Here there is a perpetual dispensation from service. The defendants never applied for an abatement. There was no agreement between the parties that the services should be withdrawn. The ghatwali tenures having existed long before the Permanent Settlement—see 1 Hamilton's Hindustan, p. 249, and *Raja Leelanund Singh* v. *The Bengal Government* (1)—are protected by s. 37, exception first, of Act XI of 1859; see the remarks of Sir Barnes Peacock in *Kooldeep Narain Singh* v. *Mohadeo Sing* (2) affirmed in Privy Council (3).

It was contended on the other side that the defendants are talukdars. If they are independent talukdars, the plaintiff cannot affect them; if dependent talukdars, they are protected by s. 51 of Reg. VIII of 1793. As to whether s. 2, Act VIII of 1859, applied, *Wooma Tara Dabee* v. *Unnopoorna Dassee* (4) and *Mohima Chunder Mozumdar* v. *Asradha Dossia* (5) were quoted, and it was contended that the section did apply.

The *Advocate-General* in reply.

Cur. ad. vult.

GARTH, C. J.—THIS suit is brought by the plaintiff, the zemindar of the mehals of Khurukpore, to recover from the defendants certain arrears of rent in respect of Taluk Kukwara, appertaining to the Khurukpore mehals; and also to have his right declared to an enhanced rent at the annual rate of Rs. 11,240 from the beginning of 1282 F.S., or any other rate which the Court may think just as an equivalent for the ghatwali services which the defendants and their predecessors

(1) 6 Moore's I. A., 112-113.

(2) B. L. R., Sup., Vol., 559 at p. 566; S. C., 6 W. R., 199, at p. 204.

(3) 11 B.L.R., 71; S.C., 14 Moore's I. A., 250.

(4) 11 B L. R., 158; S. C., in the Court below, 2 B. L. R., A. C., 102.

(5) 15 B. L. R., 251; S. C., 21 W. R., 207.

in title have been used to render, but which now, through the agency of Government, have been discontinued.

This is probably the last scene in a long series of litigation which has been going on between these parties for upwards of thirty years past. The defendants and their ancestors have, from the year 1785, and probably from a still earlier period, been in possession of Taluk Kukwara under a ghatwali tenure. The origin and nature of these tenures are explained very clearly in the judgment delivered by Lord Kingsdown in the case of *Rajah Leelanund Singh* v. *The Bengal Government* (1), which was a suit brought by the Government of Bengal, in the year 1838, to resume possession of, and to assess to revenue, certain ghatwali lands within the present plaintiff's zemindary of Khurukpore; and which suit, after having been litigated for many years in this country, was finally dismissed by their Lordships in the Privy Council in the year 1855. And it is very necessary for our present purpose to bear in mind what was the true origin and nature of these tenures. They were created by the Mahomedan Government in early times, as a means of providing a police and military force to watch and guard the mountain passes from the invasions of the lawless tribes who inhabited the hill districts. Large grants of land were made in those days by the Government, often to persons of high rank, at a low rent, or at no rent at all, upon condition that they should provide and maintain a sufficient military force, to protect the inhabitants of the plains from these lawless incursions; and the grantees on their part subdivided and regranted the lands to other tenants (much in the same way as military tenures were created in England in the feudal age), each of whom, besides paying generally a small rent, held their lands in consideration of these military services, and provided (each according to the extent of his holding) a specified number of armed men to fulfil the requirements of the Government.

This was the state of things at the time when the East India Company by Reg. LXXII of 1791 effected the decennial settlement of Bengal, Behar, and Orissa. By this settlement

(1) 6 Moore's I. A., 109.

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the amount of land revenue payable by the superior grantees to the Government, which had theretofore been more or less uncertain, was fixed at a certain rate or jama for a period of ten years. This jama was to be ascertained by the Collector upon equitable principles, to be approved by the Board of Revenue; certain allowances, called malikana and kurchay, were made to the zemindars for their maintenance and disbursement; and one of the conditions of this new holding was, that the zemindars should be responsible, as theretofore, for the peace and protection of the district.

At this time the zemindari of Khurukpore was in the hands of Kaja Kadir Ali. A large proportion of the lands of this zemindari was held upon ghatwali tenure; and, amongst others, Taluk Kukwara was held upon that tenure by the predecessor in title of the present defendant.

The earliest grant which we find of this taluk is dated the 24th of Jeit 1795, and will be found in page 243 of the paper-book. It purports to have been made by Captain James Browne (who appears to have held at that time an office under Government) to Ranku Singh and Bhyro Singh, from the commencement of the year 1184 Fasli, at a rent of Rs. 245-12-15, upon certain conditions mentioned in the grant; and, amongst others, that the jagirdars or grantees should cause the roads within their village to be closely watched, and when summoned to the presence (of the superior zemindar) should attend the presence with their body of men; and there is a special provision, that if any murders, dacoities, affrays, &c., should be discovered, or if the jagirdars should give bad advice, or cause injury to the interests of Government, they should forfeit their office and be dispossessed of their lands.

Then follows a list of twenty-two mouzas contained in the taluk.

The next document relating to the same tenure is a grant, dated the 27th of January 1780 by Kaja Kadir Ali (the then zemindar of Khuruckpore) to the same jagirdars, Bhyro Singh and Ranku Singh, confirming them in the tenure, requiring them by good treatment to keep the tenants of the land contented, and to watch and look after the ghat and chowkies, so

that no thieves or murderers should remain in the neighbourhood. They are enjoined to seize therein and prosecute cattle-stealers under penalty of being themselves responsible, and that they should attend the presence when summoned At the foot of this document we find a detailed statement, showing the number of armed men to be provided by the grantees of the tenure, and the share of rent payable by each. They were to provide 172 burkundazes and archers with sirdars, and of the rent

Bhyro Singh was to contribute ...	...	178	3 5
and Ranku Singh	...	67	9 10
Total ...		245	12 15

These being the grants or sanads under which the defendants and their predecessors in title held the lands in question, there can be no doubt that, at the time of the Permanent Settlement, the Taluk Kukwara formed a part of the Khurukpore zemindari, and we consider that the holders of that taluk were "dependent talookdars" of that zemindari within the meaning of Reg. VIII of 1793.

Many years after this, attempts were made by the Bengal Government to resume possession of these ghatwali lands, and to re-assess them to revenue as against the zemindar; but the Privy Council, in the above mentioned case of *Rajah Leelanund Singh* v. *The Government of Bengal* (1) decided that the Government had no right to do so.

It then appears that, in the year 1863, a proposal was made by the Government to compound with the zemindars for the discontinuance of the ghatwali services on payment by the zemindars to Government of an annual sum in lieu of those services; and as an inducement to the zemindars to entertain this proposal, it was held out to them that, upon their making such a composition, they might either resume possession of the ghatwali lands or enhance the rents of the ghatwal talukdars.

In a letter, dated the 12th of January 1863, from Mr. Lushington, the Secretary to the Government of Bengal, to the Commissioner of the Bhagulpore Division, after directing the

(1) 6 Moore's I. A., 169.

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Commissioner to see that the services of the ghatwals should be strictly enforced, it is said in paragraph 6 :—" But it must be admitted that the ghatwals, like the pykes of Midnapore, are of little value as police or auxiliaries to the police ; and if therefore the zemindar is willing to compound for their service by a fixed annual payment, the Lieutenant-Governor would be prepared to release the ghatwals from the obligation they are under to the State, and to replace them by a more reliable agency, and one more immediately and directly under the control of the Government. The zemindar would then be at liberty to proceed against the ghatwals, either for the resumption of their lands or the enhancement of their rents, without any hindrance on the part of the Government. But unless he undertakes to furnish the Government with the means of providing an adequate police force in lieu of the ghatwals he cannot be allowed to appropriate their lands or to take from them in the shape of increased rent, the funds which are needed for the preservation of the peace and for the prevention of crime."

It is probable that the Government did not sufficiently consider how far this inducement held out to the zemindar could legally be carried out ; but upon the faith of this letter, negotiations were entered into between the Rajah Leelanund Singh, the zemindar of Khurukpore, and the Government, by which the Government, by a document, dated the 9th of November 1863, waived their claim to police services through the Pergannas Saheri within the Khurukpore estates, on condition of the zemindar paying to Government a fixed annual permanent rent of Rs. 10,000, and the arrangement is stated to have been made upon the basis of paragraph 6 of the above letter from Mr. Lushington.

Upon the strength of this arrangement with the Government, several suits were instituted by the Rajah Leelanund Singh against the respective holders of ghatwali tenures within his zemindari, to recover possession of those tenures, on the ground that the services, in consideration of which they were held, were no longer required ; and one of these suits was brought against the present defendants to resume possession of the Taluk Kukwara. In many of these suits the persons against whom

they were brought did not attempt to dispute the Rajah's claims; but all the suits which were disputed, including that brought against the present defendant, were decided against the Rajah by the Courts of this country; and upon appeal to the Privy Council that decision was affirmed in the year 1873. In the case brought against the present defendants their Lordships say:—"It is contended that the sanads (the ghatwali grants) in effect merely gave certain lands as wages to hired servants, and that the ticcadar, whenever he chose, provided the Government dispensed with the ghatwali services, might put an end to the tenure, and take back the lands which were allotted in lieu of wages. It appears to their Lordships that this contention is not a correct one; that these sanads were grants of the lands subject to certain services, *viz.*, the payment of the small rent of Rs. 245-12, and also of performing the ghatwali duties. They were not, therefore, the hiring of a servant giving him certain land in lieu of wages, but grants of land upon condition of certain services."

It may, therefore, be assumed upon the principle of those decisions that the zemindar had no right to turn the tenants out of possession by dispensing with their services, unless the Government had dispensed with those services as between the Government and the zemindar. The only question then is, "whether the fact of the Government having consented to dispense with those services as regards the zemindar, and the zemindar having agreed with the Government to pay an additional revenue of Rs. 10,000 in consideration of the Government having absolved him from the services, makes such a distinction in this case that the zemindar, as between him and the ghatwals, is entitled to treat them as trespassers and turn them out of possession. In the cases which have been cited, it was stated, that even if the Government had not dispensed with the services, it appeared to their Lordships that the zemindar would have had no right to treat the ghatwali holders as trespassers, and their Lordships see no distinction between those cases and the present. The lands were held upon a grant subject to certain services, and as long as the holders of those grants were willing and able to perform the services, the zemindar had no right to

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put an end to the tenure whether the services were required or not."

Their Lordships then go on to say in the next case, which was decided upon similar grounds: "Their Lordships express no opinion as to whether the plaintiff would be entitled to enhance the rent, whether the circumstances of the case would enable him to enhance the rent, or whether a suit to enhance would be barred by the Statutes of Limitation, are questions which are not at present before their Lordships, and as to which they wish to express no opinion."

This suit (with others) was then brought by the plaintiff to recover arrears of rent due from the 22nd Falgoon 1267 F.S., to the close of 1281 F.S., at the former rate of rent; and also to have his right declared to an enhanced rent from the beginning of 1282 F.S.

The Subordinate Judge framed issues as to valuation, as to whether any portion of the claim was barred, as to whether the case was barred by s. 2 and s. 7 of the Civil Procedure Code, and, lastly, as to whether the defendants were liable to further assessment, and, if so, to what amount.

The Subordinate Judge, for the reasons given in his judgment, dismissed the suit.

We consider that the Subordinate Judge was right in finding that the suit had been properly valued, and in holding that the plaintiff's claim to arrears of the rent claimed was barred by limitation, except so much of it as related to the rent of the three years previous to the institution of the suit But he was in error in supposing that the provisions of ss. 2 and 7 of the Civil Procedure Code applied to the present claim, and also in not giving the plaintiff a decree for so much of the rent in arrear as was not barred by limitation.

With regard to s 2 of the Civil Procedure Code, there was no ground whatever for holding that the subject-matter of the present suit was the same as in the former one. The claims in the two suits were wholly different, and their Lordships in the Privy Council, in the former case, distinctly say in their judgment that they express no opinion as to whether the plaintiff would be entitled to enhance the rent, or whether a suit to

enhance would be barred by the Statute of Limitation. The claim, therefore, in the present suit was clearly not determined in the former one. Nor is there the slightest reason for saying that (under s. 7) this suit will not lie, because the plaintiff ought to have included his present claim in the former suit. The claims in the two suits are altogether diverse and inconsistent. It is hardly necessary, however, to notice this point, because it was very properly not argued by the respondents' Counsel.

As regards the omission to give the plaintiff a decree for the arrears of rent at the old rate for the last three years before suit, this appears to have been a mere oversight of the Subordinate Judge, for he distinctly states that the plaintiff's claim to this rent is not barred by limitation; and the defendants in their written statement (paragraph 1) admit that the plaintiff is legally entitled to this rent, only pleading that the rent for one year, namely 1281 F.S., has been deposited in the Court of the Munsif of Bhagulpore.

Upon the main point in the case, *viz.*, whether the plaintiff was entitled to enhance the defendants' rent, we quite agree with the Judge of the lower Court. The defendants, as far as we can see, are still perfectly ready and willing, as they always have been, to fulfil the obligations of their sanads as between them and the plaintiff, and it is not because the plaintiff has thought fit to compound the ghatwali services with the Government, without the defendants' consent that the plaintiff has any right to change the terms of the defendants' tenure.

We find nothing in the sanads themselves, nor any law or custom applicable to those sanads, which would justify the plaintiff's claim for enhanced rent.

The first sanad granted by Captain Browne expressly provided that the ministerial officers and zemindars of Taluk Kukwara should uphold the mokurari and istamrari jama of the said pergannas, and receive the jama year by year, *and should not demand a fraction more.*

And even if the rent reserved by the sanads were of such a nature as would be liable to enhancement, we consider that the first clause of s. 51 of Reg. VIII of 1793 expressly prohibits any enhancement under the circumstances of this case.

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One of the plaintiff's contentions is, that by s. 56 of the Contract Act, the engagement between the plaintiff and the defendants has become void; but it is clear that this section cannot apply, because the contract was not broken in any way by the ghatwals; and any change in the extent of their obligations under it was owing to circumstances over which they had no control.

It was also argued that these ghatwals are neither independent nor dependent talukdars, but mere ordinary lease-holders, liable to have their rents enhanced under the Rent Law. They certainly are not independent talukdars, because the zemindar had a beneficial interest in the tenure, and these tenures were never registered as independent taluks. Moreover, they are not of the class of dependent talukdars referred to in s. 16 of Beng. Act VIII of 1869, because they do not possess a permanent transferable interest in the land, but it by no means follows that their status is that of ordinary lease holders. The High Court (in their decision of the 17th June 1865 in the former suit) considered "that the defendants held a perpetual hereditary tenure at a fixed jama in money and service, and that, except for misconduct on their part, they could not be evicted." The Privy Council on appeal said, "that though it may be doubtful whether the words mokurari istemrari used in the sanad mean permanent during the life of the person to whom they are granted, or permanent as regards hereditary descent, yet their Lordships were of opinion that, coupling those words with the admitted usage for a long series of years, the tenures were hereditary"

The defendants are thus found to be holders of an old hereditary tenure which was established long before the Government took possession of the country; and we are of opinion that they do come under the denomination of dependent talukdars as defined in Reg. VIII of 1793, and further that they are protected by the first clause of s. 51 of that Regulation, which is very comprehensive, and includes all talukdars not included in s. 5.

It is argued that s. 51 does not protect the defendants' tenure from enhancement, because there has been an abatement from the defendants' jama. But we hold that there has been

no such abatement. The jama was that part of the rent which was to be paid in money, and in that jama there has been no abatement. There certainly were other conditions besides the jama, which formed part of the consideration for the grant; but these were no part of the jama, and any variation in the number of men to be provided and maintained in accordance with those condition could not, even if it had been made with the defendants' consent, be construed into an abatement of jama which would give the plaintiff a right to enhance.

We think, therefore, that neither by the general law, nor by any custom of the district, nor by any terms of the defendants' tenure, nor by any previous abatement of the defendants' jama, has the plaintiff any right to enhance the defendants' rent. He is, however, entitled to a decree for the rent due for the last three years at the old rate.

The lower Court's order is, therefore, modified, and the appeal decreed only to this extent, with costs in proportion both in this Court and in the lower Court.

No. 251.—The same results will follow in this appeal. The only difference between the case of this defendant and the defendant in the other case is that the first sanad of the property in question here is dated in 1794, which was after the date of the Permanent Settlement. But in the case of *Rajah Leelanund Singh* v. *Munrunjun Singh,* heard in the Privy Council on the 13th of March 1873, where it was decided that the present plaintiff has no right to eject the present defendant from this very property, their Lordships expressed an opinion that although the sanad of 1794 was an original one, it appeared to be a re-grant of old ghatwali land.

In accordance with that opinion, we find in this case, that these lands had been held on ghatwali tenure before the Permanent Settlement, and that, for the reasons given in the other case, the judgment of the Court below should be affirmed, except so much of it as relates to the arrears due for the last three years at the old rate. For this amount the plaintiff is entitled to a decree with interest from the date of suit to the date of realization.

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The lower Court's order is, therefore, modified and the appeal decreed to this extent, with costs in proportion, both in this Court and in the lower Court.

McDONELL, J.—Our judgment in this case will govern Regular Appeal No. 59. The same order will be made in that case.

Decrees varied.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

1877 *Aug.* 3 & 6.

KARTICK CHURN SETTY *v.* GOPALKISTO PAULIT AND ANOTHER.

Jurisdiction—Cause of Action—Goods obtained by Offence or Fraud—Contract Act IX (of 1872), s. 178—Bailment—Pawnor and Pawnee.

G went to the plaintiff's place of business in Calcutta, and representing to him that he wanted some jewellery on inspection, and would purchase it if he did not return within ten days, obtained from the plaintiff a quantity of jewellery depositing as security Rs. 2,000 with the plaintiff. *G*, having thus obtained the jewellery, took it to *K*, at his residence which was out of the local limits of the jurisdiction of the Court, and pledged the jewellery to *K* for Rs. 6,000. In a suit brought against *G* and *K* to recover the jewellery or its value, *G* did not appear, and *K* alone defended the suit. *Held*, that it being, with reference to s. 178 of the Contract Act, an essential element in the plaintiff's case that the jewellery had been obtained from the plaintiff by fraud in Calcutta, part of the cause of action against *K* arose in Calcutta so as to enable the Court, leave having been obtained under cl. 12 of the Charter to entertain the suit against him.

Held also, that the plaintiff was entitled to recover the jewellery from *K*, under s. 178 of the Contract Act, *G* having obtained it from the plaintiff by an offence or fraud within the meaning of that section.

THIS was a suit to recover certain jewellery alleged to have been obtained by the defendants from the plaintiff under false pretences, and for Rs. 1,500 as damages for the wrongful acts of the defendants.

The plaint stated that, on the 16th July 1876, the plaintiff was visited by the defendant Gopalkisto Paulit, who represented himself to be in the employ of a master who required jewellery

as presents on the occasion of the marriage of a son, and asked to be permitted to take away certain articles for the purpose of submitting the same for the approval of his master. The plaintiff not being acquainted with Gopalkisto at first declined to accede to his request, but subsequently a reference satisfactory to the plaintiff having been given, the plaintiff consented to allow him to take away from the plaintiff's kotee jewellery of the value of Rs. 7,800 for the purpose of showing it to his employer. The third paragraph of the plaint stated that the defendant Gopalkisto Paulit induced the plaintiff, by the said allegations, to entrust the same to him, and by and with the permission of the plaintiff, induced by such representations, he took the said jewellery from the plaintiff's shop for the alleged purpose of permitting the same to the inspected by his master. The defendant Gopalkisto deposited the sum of Rs 2,000 as security or earnest-money for the payment of the said sum of Rs. 7,800 in case his master should approve of the said goods on inspection, and gave the plaintiff a receipt in writing for the jewellery, acknowledging that he had received the same on inspection for ten days. The defendant subsequently obtained other jewellery from the plaintiff in the same way to the extent of Rs. 3,820. The plaintiff afterwards learnt that the allegations of the defendant Gopalkisto that he was taking the goods for inspection, and that they were to be purchased by his master, were wholly untrue; and that, on the 18th day of July, he had, without the knowledge or assent of the plaintiff, pledged all the jewellery entrusted to him by the plaintiff to the defendant Cowar Kally Kissen Roy, at his residence in Chitpore in the suburbs of Calcutta. The plaintiff, on discovering the fact of the said pledge, applied befo re the Deputy Magistrate of Sealdah, and obtained the issue of a warrant against the said Gopalkisto Paulit on a charge of breach of trust and criminal misappropriation of the said jewellery; but the case was, on the 13th of September instant, dismissed by the Sealdah Magistrate, on the ground that he had no jurisdiction. The jewellery so pledged as aforesaid was, at the time of suit, in the Sealdah Magistrate's Court.

The plaintiff submitted that the jewellery was delivered to the defendant in Calcutta on inspection, and the bailment

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thereof was determined by the aforesaid pledge of goods at Chitpore, and hence part, at all events, of the cause of action arose in the town of Calcutta.

The defendant Gopalkisto did not appear to the suit.

The defendant Kally Kissen put in a written statement, in which he submitted that he was not subject to the jurisdiction of the Court, and that the suit ought to be dismissed as against him. He stated that he had no knowledge of the facts alleged in the plaint as to the manner in which Gopalkisto became possessed of the jewellery ; but he alleged that, on the 18th July, on the security of certain jewellery pledged to him by Gopalkisto, whom he had reasonable grounds for believing to be a respectable man, he made over to him Government securities to the amount of Rs. 6,000, on the promise of Gopalkisto to redeem the jewellery within two months, on payment to Kally Kissen of the value of the Government securities with interest at 9 per cent. per month with option to Gopalkisto to extend the period of the loan for another two months on payment of interest then due, and with power to Kally Kissen to sell the jewellery in the event of its not being redeemed within the stipulated time. He further stated that, according to the custom of trusts amongst the native dealers in jewellery, no bill or other document is given by the seller of jewellery to the purchaser as evidence of the sale, but the ownership passes by delivery of possession; and that the defendant Gopalkisto had not paid the principal or interest of the loan or any portion thereof. He submitted that, assuming the allegations in the plaint were true, the conduct of the plaintiff in his transactions with Gopalkisto were extremely imprudent and unbusiness-like, and calculated to be injurious to innocent parties, and therefore the plaintiff was not entitled to any redress.

Leave to sue had been obtained under s. 12 of the Charter.

Mr. *Evans* and Mr. *J. G. Apcar* for the plaintiff.

Mr. *J. D. Bell* and Mr. *Hill* for the defendant Kally Kissen.

Mr. *Evans* for the plaintiff contended that, as the obtaining the jewellery took place in Calcutta, a part of the cause of

action arose within the jurisdiction so as to entitle the plaintiff, with the leave of the Court, to sue in Calcutta. The plaintiff's case depends on this: that the goods were obtained from him by an offence or fraud in Calcutta, all circumstances necessary to establish the plaintiff's right are parts of the cause of action, and the offence by which the jewellery was obtained is a circumstance necessary to establish his right. The question, what was Gopalikisto's right, is one which must arise in this suit. If this were a suit against Kally Kissen for conversion, the question of Gopal's title would not arise; but this is an equity suit in which the plaintiff must show his right to recover from Gopal. At the time of the pledge to Kally Kissen the right to possession of the jewellery was in Gopal, to whom a bailment had been made for a particular purpose. It may be that Gopal's breach of the contract of bailment was out of Calcutta, but surely the existence of the bailment is part of the cause of action. Here also we allege a joint action or conspiracy by the two defendants, in which case, if part of the cause of action arose in Calcutta, this Court would have jurisdiction.

Mr. *Bell* for the defendant Kally Kissen.—The cause of action against this defendant is the detention of the jewellery: it is a tort. There cannot be a joint action against this defendant and Gopal, a bailee of the plaintiff. There is no charge of want of good faith against Kally Kissen—see s. 178 of Contract Act; nor is there any evidence of *mala fides* on Kally Kissen's part. There is no evidence of fraud or offence in obtaining the goods. It is submitted that the cause of action arose out of the jurisdiction, and the suit as against Kally Kissen must be dismissed.

Mr. *Evans* in reply.—The latest case on the jurisdiction is that of *Mulchand Joharimul* v. *Suganchand Shivdas* (1), where the Court points out that the cases decided as to the County Courts' jurisdiction in England are the true guides on the construction of the Charter; see *De Souza* v. *Coles* (2) and *Cameron* v. *Gray* (3). Fraud has been shown, inasmuch as it is proved that Gopal

(1) I. L. R., 1 Bomb., 23. (2) 3 Mad. H. C., 384.
(3) 6 T. R., 363.

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fraudulently alleged he wanted the goods for inspection when he wanted them to raise money upon.

MACPHERSON, J.—In this case the facts, which I find to be proved, are, that the defendant Gopalkisto Paulit came to the plaintiff's place of business in Calcutta, and there got from him the jewellery, which is the subject of this suit, taking it away and giving for it a receipt in which the prices of the articles were mentioned, and it was stated that they were taken on ten days' inspection. He said, he was taking the jewels on inspection, and would purchase if he did not return within the ten days. But I do not consider it proved that he ever said he would send them up to Moorshedabad or to Baboo Poolinbehari Sen.

I believe that the plaintiff allowed him to take away the jewellery, because he said he wished to take it with a view to purchase on ten days' inspection, and would buy if he did not return within that time, because he deposited two thousand rupees, and because Koylash Chunder Sircar, a cashier in the employment of Moharaja Jotindro Mohun Tagore, said that he was a respectable man, and good for twelve thousand rupees. Gopalkristo Paulit, having thus obtained the jewellery, immediately took the articles to the defendant Kally Kissen Roy at his house, which is just outside the limits of the town of Calcutta, and there and then pledged them for 6,000 rupees.

The present suit is brought to recover the jewellery or its value either from Gopalkisto Paulit or from Kally Kissen Roy. Gopalkisto not being now forthcoming, the suit is in truth chiefly brought in order to establish the liability of the defendant Kally Kissen Roy, with whom all the articles were pledged, with the exception of one ring, which in the receipt is stated to be worth Rs. 250

The plaintiff's suit is based upon the 178th section of the Contract Act, which declares that the person in possession of goods may make a valid pledge of them, provided the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; but adds a proviso, the effect of which is, that no such

pledge is valid if the goods have been obtained from their lawful owner by means of an offence or fraud.

The plaintiff's case is that the pledge of these articles to the defendant Kally Kissen Roy was not a valid pledge, even if he acted in good faith, because Gopalkisto Paulit had obtained them from the plaintiff by means of an offence or fraud.

The defendant Kally Kissen Roy's principal defence is, that the transaction in which alone he is concerned having taken place at his house, which is beyond the limits of the ordinary jurisdiction of this Court, the suit will not lie, this Court not having jurisdiction in the matter so far as he is concerned.

I was at first much inclined to think that the defence was good. But, on further consideration, I think that this Court has jurisdiction. The plaintiff's cause of action is really this that although the defendant Gopalkisto Paulit was in possession of these articles at the time he pledged them with the defendant Kally Kissen Roy, still Gopalkisto Paulit had obtained them from their lawful owner by means of an offence or fraud; and therefore the plaintiff, as such lawful owner, is entitled to recover them or their value from the pawnee. There is no doubt the plaintiff could not prove his case against Kally Kissen Roy without showing the circumstances under which Gopalkisto Paulit got possession of the goods: and as all these circumstances occurred within the town of Calcutta, I think that a part of the plaintiff's cause of action did arise in Calcutta. The offence or fraud by means of which Gopalkisto obtained possession took place in Calcutta, and that offence or fraud is certainly part of the plaintiff's cause of action.

On the issue as to whether the goods were obtained from the plaintiff by fraud, I think (my opinion on this point also being somewhat contrary to my first impression), that the plaintiff made out a *primâ facie* case when he proved that he was induced to give the articles to Gopalkisto Paulit by his representation that the took them merely on inspection for ten days with a view to purchasing,—and proved that a few hours afterwards these articles were pledged by Gopalkisto for 6,000 rupees. There is certainly some evidence of an offence,

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to wit, the offence of cheating,—and at any rate there is evidence of what would fall under the more general term "fraud," which is used in s. 173.

The case thus proved by the plaintiff is much strengthened by the evidence of the defendant Kally Kissen Koy. For he says distinctly that Gopalkisto Paulit represented to him that the jewels were his own, which was absolutely false. The acts of Gopalkisto Paulit might possibly have been capable of explanation. But these matters occurred twelve months ago, and no explanation of them has been offered up to this time. That being so it is impossible to come to any other conclusion than that Gopalkisto, the pawnor of these jewels, had obtained them from their lawful owner by means of an offence or fraud.

The plaintiff is entitled to a decree as against the defendant Kally Kissen Roy, as well as against the other defendant, for the jewels or for their value, to wit Rs. 8,000. But then the plaintiff admits 2,000 rupees were deposited by Gopalkisto Paulit as security: and that money must be taken *pro tanto* in satisfaction of the Rs. 8,000. The jewels pledged with the defendant Kally Kissen Roy, and which are produced in Court and valued at Rs. 8,000, do not include the ring which is in the receipt signed by Gopal as valued at Rs. 250.

Therefore, the plaintiff is entitled to deduct those Rs. 250 from the Rs. 2,000 in deposit' unless the ring is returned to him. The decree against Kally Kissen Roy will be for the jewels produced in Court or Rs. 6,250. As regards Gopalkisto, the decree will be for all the jewels (*i.e.*, all those produced in Court, plus the missing ring) or Rs. 6,250.

In any event the plaintiff is entitled to costs on scale 2.

Judgment for plaintiff.

Attorney for the plaintiff: Mr. *Remfry*.

Attorney for the defendant Kally Kissen: Mr. *Gillanders*.

APPELLATE CIVIL.

Before Sir Richard Girth, Kt., Chief Justice, and Mr Justice Birch.

EKRAM MUNDUL AND OTHERS (DEFENDANTS) *v.* HOLODHUR PAL (PLAINTIFF).*

1878 *Jany.* 9.

Enhancement of Rent—Notice—Beng. Act VIII of 1869, *s.* 14—*Res judicata.*

A lease from generation to generation gave the boundaries of the land leased, estimated the area thereof, and fixed a certain rent per biga. It contained a condition that, if on measurement the actual quantity of land should turn out to be either more or less than the estimated area, the rent should be increased or decreased in proportion at the same rate per biga. In a suit for enhancement of rent, on the ground that the land leased contained more than the estimated number of bigas, the lease being one which did not specify the period of the engagement,—*Held*, that notice of enhancement was necessary under Beng. Act VIII of 1869, s. 14.

In a previous suit the present plaintiff had sued the defendant for the amount of rent originally fixed in the lease, and the defendant claimed in that suit to have the rent reduced in accordance with the terms of the lease, and a measurement was thereupon made, which showed that the quantity of land held by the defendant was in excess of that named in the lease : that suit was decided in favour of the plaintiff for the rent claimed. *Held*, that the measurement adopted by the Court in the former suit was not, as regards the amount of the excess, binding upon the defendant, and that, even if it were, the fact of such measurement would be no sufficient notice of enhancement to the defendant.

THE facts are sufficiently stated in the judgment appealed from, which was as follows :—

AINSLIE, J.—The defendant holds certain lands from the plaintiff under a lease from generation to generation. The lease gives the boundaries of the lands. It estimates the area to be 47 bigas 5 cottas, and fixes the rent at Rs. 59 odd annas at

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 29th of May 1877, in Special Appeal, No. 2697 of 1876, from the decree of Baboo Kristomohun Mookerjee, the Second Subordinate Judge of Nuddea, dated the 31st of August 1876, modifying the decree of Baboo Kristo Behary Mookerjee, the Munsif of Kooshtea, dated the 16th of August 1875.

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the rate of Re. 1 annas 4 a biga. It contains a condition that if on measurement the actual quantity of land should turn out to be either more or less than 47 bigas 5 cottas, the rent will be increased or decreased in proportion at the same rate per biga.

The lower Appellate Court has held that in a case of this kind no notice of enhancement is required.

It appears to me that, although the case does not fall strictly within the terms of s. 14 of Beng. Act VIII of 1869, a notice would, nevertheless, be necessary. The tenant is entitled to know the amount of rent demanded from him for each year at its commencement; and until measurement has been made and notice of the result of it given to him, he would be entitled under this lease to hold on from year to year at the old rent of Rs. 59 odd annas; but although it seems to me that he was entitled to a notice, I do not think that the present suit can be entirely defeated for want of notice, because it appears that in 1870 the plaintiff sued the defendant for rent at the rate originally fixed, namely, Rs. 47 annas 5. The defendant then put forward his right to have the rent reduced under the terms of the lease; and, in consequence of this plea, a measurement was made by the Court for the purposes of that suit. This in fact was a measurement which the defendant himself caused to be made after notice to the plaintiff under the conditions of the lease; and therefore, by the terms of the lease, he must be bound by the results of that measurement, and cannot claim to have a separate notice from the plaintiff after he has himself elected to put in force that condition of the lease which reserved to either party a right of measurement.

With reference to the finding of the Court in the former suit, it has been contended that it is not binding in the present case; but it seems to me that it cannot be otherwise. A question having arisen between the parties as to what would for the future be the proper rate of rent under the condition of the lease, and it having been determined, according to the terms of the lease, that a certain quantity of land was in the occupation of the defendant, and therefore that a certain rent was payable by him, it appears to me that that question was necessarily tried and determined once for all, and that neither party is at liberty to

re-open it. The case cited by the lower Appellate Court—*Nobo Doorga Dassee* v. *Foysbux Chowdhry* (1)—appears to me to govern this case precisely.

Then there remains the question whether the plaintiff in this case is entitled to recover the excess rent for 1277 (1870). As regards four annas in respect of that year, it is perfectly clear that he cannot recover it on the ground that when he brought his former suit for the four-anna kist of 1277 he was bound to sue for the whole of the arrears then due to him; but I think that effect must be given to the first objection in respect of the other 12 annas, —that is, that there was no notice of any change of the rent until after the end of the year 1277. It appears to me that the measurement which was made in the former suit must be taken as a measurement effected on the day on which that suit was decided in the first Court, and the measurement of the ameen accepted and confirmed, which was on the 6th of Bysack 1278 (18th April 1871). Therefore, as regards the excess rents claimed for 1277 with any interest thereon, the decision of the Court below must be set aside. In respect of the remainder of the claim, the judgment of that Court is affirmed.

From this decision the defendant appealed.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Shoshi Bhoosun Dutt* for the respondent.

The judgment of the Court was delivered by

GARTH, C. J.—We think that this appeal should be decreed. The facts of the case are correctly stated in the decision of Mr. Justice Ainslie; and we quite agree with that learned Judge that before the plaintiff in this case (the landlord) could sue the tenant for increased rent upon the ground that the land demised consisted of more than 47 bigas and 5 cottas, he was bound to give the defendant a previous notice that the increased rent would be required of him

It seems to us that this notice was rendered necessary by s. 14 of Beng Act VIII of 1869; because we have had the lease

(1) I. L.R., 1 Calc., 292; S. C. 24 W. R., 403.

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in question read, and it appears to be one "not specifying the period of the engagement;" so that, until he had received such a notice as the section requires, the defendant could not be called upon to pay a higher rent than he did in the year preceding the suit. Mr. Justice Ainslie considers that the defendant was entitled in this case to some notice, though he thinks that s. 14 does not apply. But the learned Judge proceeds to say that the defendant did in fact have sufficient notice that the increased rent was payable, because in the former suit, which the plaintiff brought against the defendant for rent in the year 1870, a measurement of the demised lands was made at the instance of the defendant, the result of which was that the land was found to contain an excess of 11 bigas 16 cottas beyond the quantity mentioned in the lease.

Now, in order to see how far the defendant was bound by this measurement, and how far the fact that he knew of its being made was a sufficient notice to him to enable the plaintiff to bring this suit, we must first see what was the nature of the former suit. It was a suit by the plaintiff to recover from the defendant the rent originally fixed by the lease. The defendant pleaded that the actual quantity of land was less than that estimated in the lease, and consequently that he was entitled to an abatement. In order to ascertain the correctness of this plea, an ameen was appointed by the Court to measure the land; and the land upon measurement was found to contain more, instead of less, than the estimated quantity; the excess being 11 bigas 16 cottas. Upon this the plaintiff obtained a decree, not for any excess rent, but for the original rent for which he had brought his suit, the Judge holding very properly that he could not decree him a larger rent than he had claimed in his plaint. But it follows from this that the judgment in that suit, whatever the evidence of the ameen or the observations of the Judge may have been, was only conclusive between the parties upon the question whether the land demised was or was not less than, or equal to, the estimated quantity. Whether it was more than the estimated quantity was a question immaterial to the suit, and one which from the very nature of the issue the Judge could not, and did not, decide. Perhaps the best test of this is,

that if the defendant had desired to call evidence at the trial to disprove the excess, or to appeal from the judgment, upon the ground that in fact the land did not exceed the estimated quantity, he could not have done so, that point being immaterial to the purposes of the suit.

In the case referred to by Mr. Justice Ainslie—*Nobo Doorga Dassee* v. *Foyzbux Chowdhry* (1)—the point decided in the first suit was necessary to the due determination of the issues in both suits, and therefore the judgment in the one case was held to be binding in the other. But here it is not so. We consider, therefore, that the measurement found by the ameen, and adopted by the Court in the suit of 1870, was not, as regards the excess, binding upon the defendant. But even supposing it were, we think it clear that the judgment in the former case, although known to the defendant, would not be a sufficient notice to him by the landlord under s. 14 of Beng. Act VIII of 1869. That notice is required to be in a particular form, and served a certain time before any suit can be brought for the excess rent; and the obvious intention of the Legislature, as it seems to us, was, that the tenant before he could be sued for any higher rent than he had previously paid, should have notice, not only that such rent might be demandable, but that his landlord intended to demand it.

The fact of the land having been measured and found to contain more than the estimated quantity would be no sufficient notice in our opinion that the landlord intended to insist upon the higher rent.

We are of opinion, therefore, that the original judgment of the Court of first instance, giving the plaintiff a decree for the original rent and rejecting the claim for the excess rent, was correct; and that all subsequent judgments should be reversed, the defendant being entitled to his costs in all the Appellate Courts, and also of the second trial before the Munsif in the Court of first instance.

Appeal allowed.

(1) I. L. R., 1 Calc., 202: S. C., 24 W. R., 403.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

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Jany. 9.

PARBUTTY NATH ROY CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* MUDHO PAROE AND OTHERS (DEFENDANTS).*

Jalkar—Easement—Dispossession—Limitation Act IX of 1871, *s.* 27, *Sched. II, art.* 145.

A jalkar is not an easement within the meaning of s. 27 of Act IX of 1871, but is an interest in immoveable property within the meaning of Sched. II, art. 145 of that Act. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff for more than twelve years, *Held*, that a suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation.

THE judgment appealed from, in which the facts are fully stated, was as follows:—

AINSLIE, J.—The plaintiffs in this suit seek to recover the rents of a certain jalkar from the defendants, who in answer allege that the jalkar is the property of Government, and if this is not so, that they have never paid rents to, and do not hold from, the plaintiffs. The Judge of the lower Appellate Court has found that, with the knowledge, but without the permission, of the plaintiffs, the defendants have been fishing in this water for at least eighteen years adversely to plaintiffs, and that the law of limitation bars this suit.

It has been urged in special appeal that the plaintiffs having enjoyed possession through other tenants cannot be barred. I think, however, that where property is of such a nature that there may be equal enjoyment thereof by several persons at one and the same time without necessary interference one with another, it is not necessary for respondent to establish the total exclusion of the plaintiffs in order to succeed on the plea of limitation. If, as in this case, the defendants can show that while plaintiffs may have been enjoying profits out of this fishery through others, they themselves have within the knowledge of the plaintiffs

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 7th of June 1877, in Special Appeal No. 2219 of 1876, against the decree of J. O'Kinealy, Esq., Officiating Additional Judge of the 24-Pergannas, dated the 17th of June 1876, reversing the decree of Baboo Ram Doyal Ghose, Second Munsif of Bassirhaut, dated the 20th January 1876.

been appropriating the entire produce of their own fishing in the same waters without in any way acknowledging the plaintiffs' title, they do in effect prove an adverse possession *pro tanto.*

It was, however, further argued that possession for twenty years is necessary to establish a prescription. But, as the law now stands, the case does not fall within the provisions of s. 27 of the Limitation Act, and must therefore be governed by art. 145. The Judge orrectly observes that the right claimed is not an easement; and although in the draft of an amended Law of Limitation recently published the meaning of the word 'easement' is intended to include such claims, it has, as the law now stands, a more restricted meaning.

As the Judge has found that the enjoyment of the fishery has not been by license or consent of plaintiffs, but, on the contrary, accompanied with a denial by plaintiffs of the defendants' right to fish, and a denial by defendants of plaintiffs' right to interfere with or tax their fishing, and that this state of things has been going on for eighteen years, the suit was rightly dismissed. The appeal is dismissed with costs.

Baboo *Chunder Madhub Ghose* for the appellants.

No one appeared for the respondents.

The judgment of the Court was delivered by

GARTH, C. J.—We have felt some difficulty in coming to a conclusion upon this case, partly from the peculiar nature of the rights claimed by the plaintiffs, and partly from there being no provision in the Limitation Act of 1871 which applies to, or contemplates, a suit of this nature.

The plaintiffs claim to be entitled to an 8-anna share of a certain jalkar, and they pray for a declaration as against the defendants,—*first*, that they are entitled to receive rent from them for fishing in their jalkar; or, *secondly*, that the defendants have no right to fish there without paying them (the plaintiffs) rent; or, in other words, that the plaintiffs are entitled to enjoy their jalkar rights without the defendants' interference.

The Munsif very properly dismissed the first portion of the plaintiffs' claim, upon the ground that the defendants were

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and had never claimed to be, the plaintiffs' tenants. But he decreed their claim in the other alternative, declaring in substance that the plaintiffs had a right to the share which they claimed in the jalkar, and that the defendants could not fish there without the plaintiffs' permission. He holds that the right of fishing claimed by the defendants in the jalkar was at most an easement; that the defendants, therefore, could not become entitled to it by prescription till they had enjoyed it as of right for twenty years (see Limitation Act of 1871, s. 27), and that their use and enjoyment of it had not been proved for more than eighteen years.

The Additional Judge on appeal reversed this decision of the Munsif. He held that neither the right of fishing claimed by the defendants, nor the jalkar rights claimed by the plaintiffs, were "easement." He apparently considered that the enjoyment of the right of fishing by the defendants was an interference by them with the exclusive right claimed by the plaintiffs, and ultimately decided that as the plaintiffs had not brought their suit to establish such exclusive right within twelve years of the defendant's first interference, their suit was barred by limitation, and ought to be dismissed.

The learned Judge of this Court has approved the finding of the lower Court, and substantially upon the same grounds.

It has now been urged before us on appeal from his decision: *1st*, that the jalkar which the plaintiffs claim is not in its nature "immoveable property, or an interest in such property," within the meaning of the Limitation Act; and that consequently art. 145 of the 2nd Schedule to the Act does not apply; *2nd*, that a jalkar is an easement, to which the defendants could only become entitled by twenty years' use (s. 27 of the Limitation Act); and *3rd*, that the acts of the defendants when fishing in the jalkar were only a series of trespasses or infringements of the plaintiffs' right, each of which was a successive cause of suit; and that therefore the plaintiffs are not barred by limitation.

We think, however, that the lower Appellate Courts are right in the view which they have taken. Whatever may be the

law under the present Limitation Act, a jalkar is clearly not an easement within the meaning of s. 27 of the Act of 1871. An easement is defined by Mr. Gale in his Law of Easements (p. 5) to be "a privilege without profit" which the owner of one tenement may enjoy (as a right of way or of light over the land of another); but "conferring no right to a participation in the profits arising from it."

Now a jalkar, on the other hand, is the right to take the profits of a river, lake, or other water on a particular estate or tract of country; and although, as was decided by Justices Jackson and McDonell in the case of *Radha Mohun Mandul* v. *Neel Madhub Mundul* (1), the right to a jalkar may not involve any actual property in the soil over which the water flows, it is still, we think, an interest in immoveable property within the meaning of art. 145 of the Limitation Act.

We also agree with the lower Appellate Courts that the acts of the defendants in taking fish from this jalkar for so many years cannot properly be considered as successive acts of trespass. They appear to have been exercised continuously under a claim of right, and in the only way in which that right could be effectually asserted. Assuming that the plaintiffs' possession of the jalkar consisted of the participation of the profits derivable from it, the enjoyment by the defendants of a partial participation of those profits for a long course of years must be considered (as Mr Justice Ainslie describes it) as a dispossession by the defendants of the plainsiffs' right *pro tanto* during that period. The plaintiffs ought, therefore, to have brought their suit within twelve years from the commencement of such dispossession.

The appeal is dismissed without costs, no one appearing for respondents.

Appeal dismissed.

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(1) 24 W R., 200.

PRIVY COUNCIL.

P. C.*
1877
Feb. 6, 7, 8;
March 10.

IRVINE (DEFENDANT) *v.* THE UNION BANK OF AUSTRALIA (PLAINTIFFS).

[On Appeal from the Court of the Recorder of Rangoon.]

Ratification—Company—Acts done by Directors in excess of authority.

The ratification by a Company of particular acts done by its Directors in excess of the authority given them by the articles of the Company does not extend the powers of the Directors so as to give validity to acts of a similar character done subsequently.

THIS was a suit brought by the Union Bank of Australia, in the Court of the Recorder of Rangoon, to recover money advanced by the Bank to the Oriental Rice Company, and to enforce an equitable mortgage on certain premises situated in Rangoon as a security for the advance, against the said Company and against the defendant William Irvine, who had purchased the Company's rights and interest in the mortgaged property at a sale in execution of a decree obtained against the Company by other creditors.

By one of the articles of association of the Oriental Rice Company, which was formed at Melbourne under an Act of the Legislature of Victoria, corresponding in its provisions with the English Companies' Act, 1862, the powers of the Directors to borrow money on the credit of the Company, and to mortgage its property, were limited to a sum not exceeding in the aggregate as an existing debt at the same time one-half of the actually paid-up capital of the Company. By another article these powers might be extended by a vote of one-half the shareholders given at a general meeting; and no limit or restriction was fixed by any of the articles upon the power of the Company to borrow or mortgage.

The facts of the case are set forth in their Lordships' judgment.

The main question raised for determination was as to the amount for which the plaintiff held a valid charge on the property mortgaged.

* *Present* LORD BLACKBURN, SIR J. W COLVILE, SIR B PEACOCK, SIR M. E SMITH, and SIR R. P. COLLIER.

The Recorder of Rangoon, in a judgment dated the 8th October 1875, held that the Directors of the Rice Company had exceeded their powers in charging the Company's property with a debt greater than one-half of the Company's actually paid-up capital. But he was of opinion that the acts of the Directors in borrowing in excess of their powers had been ratified by the shareholders. He, accordingly, gave a decree against the Rice Company for the amount of the debt, and ordered that, in the event of the Company failing to pay, the mortgaged premises should be sold, and the proceeds applied in satisfaction of the plaintiff's claim.

The Oriental Rice Company did not appear or answer in the suit. The present appeal to Her Majesty in Council was brought by the defendant Irvine, who sought to have the decree of the Recorder varied by a declaration that the charge on the Company's property in favour of the Bank was valid only to the amount of one-half of the actually paid-up capital of the Company.

Mr. *Cowie*, Q.C., and Mr. *E. Macnaghten*, for the appellant, submitted that there was no evidence of the shareholders of the Rice Company having ratified the acts of their Directors in borrowing and in charging the property of the Company in excess of the limit prescribed by the Company's articles. The Directors could only pledge the property of the Company to the extent of one-half of its paid-up capital. The mortgage was valid only to that extent. The following cases and authorities were cited: Lindley on Partnership (last edn.), pp. 780, 782, *Hutton* v. *The Scarborough Hotel Company* (1); *The Electric Telegraph Company of Ireland, Troup's case* (2) and *Hoare's case* (3); *Re Pooley Hall Colliery Company* (4).

Mr. *Benjamin*, Q.C., and Mr. *W. Murray* for the respondents.—The limitation of the powers of the Directors to borrow on the credit of the Company was not a limitation on the general powers of the Company itself. It merely restricted the agency

(1) 2 Drew and Sm., 521; and 4 DeG. S. & J., 672.

(2) 29 Beav., 353.

(3) 30 Beav., 225.

(4) 21 L. T. (N.S.), 690; W. N., 1869, p. 255.

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of the Directors. Acts done by the Directors in excess of that limitation might, under the articles of association, be validated by the sanction of the shareholders. Whether the Directors had exceeded their authority was a matter between them and the shareholders, and did not affect third parties. The Bank had notice that the Directors of the Company had power to borrow and to mortgage under certain conditions. It was not necessary for it to enquire further; it might assume that these conditions had been observed. They referred to *The Phosphate of Lime Company* v. *Green* (1), *Royal British Bank* v. *Turquand* (2), Story on Agency, § 250.

Mr. *Macnaghten* replied.

Their Lordships took time to consider their judgment, which was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the Recorder of Rangoon in a suit in which the respondents, suing in the name of their Inspector, were plaintiffs, and the appellant was one of the defendants.

The suit was brought to recover the sum of 15,296*l.* 17*s.* 6*d.*, for money advanced by the Bank to the Oriental Rice Company, Limited, and to enforce an equitable mortgage as a security for the advances.

The plaintiffs prayed, amongst other things, that it might be declared that, by virtue of the deposit by the Company of certain title deeds and the agreements accompanying the same, they were entitled to an equitable lien or mortgage upon certain messuages and premises situate in the town of Rangoon for securing the repayment of the said sum of 15,296*l.* 17*s.* 6*d.*, and that upon non-payment of that amount the defendants might be foreclosed from their equity of redemption in the said premises, or that the said premises might be sold, and the proceeds applied in payment of the said sum or such other sum as the Court might find to be due to the plaintiffs with interest and costs.

The Company were made co-defendants in the suit, but they did not appear or defend.

(1) L. R., 7 C. P., 43. (2) 5 E. & B., 248, 6 E. & B., 327.

The defendant (appellant) claimed the property under a purchase at a sale in execution of a decree against the Company, by which he acquired the right, title, and interest of the Company, and nothing more. That purchase was made on the 31st May 1872.

The principal question to be decided is, what is the sum for which the Union Bank is entitled to a charge upon the property. On the part of the Bank it was contended that they are entitled to a charge for the full amount claimed ; and on the part of the defendant (appellant), that the charge is limited to the amount of one-half of the actually paid-up capital of the Company, which paid-up capital the appellant in his written statement alleged was never more than 17,100*l.*

There was some discussion at the hearing as to what really was the actual amount of the paid-up capital. Their Lordships then expressed their opinion upon the point, and stopped the learned Counsel for the respondent. They were of opinion that it should be taken at 17,100*l.*, the amount found by the learned Recorder.

The Company was originally formed in the Colony of Victoria by articles of association, dated the 25th of April 1861, and on the 18th of August 1864 it was duly registered as a Company limited by guarantee under an Act of the Legislature of Victoria, which followed and adopted the provisions of the Companies' Act, 1862. By that registration the Company, by virtue of the section of the Colonial Act, corresponding with s. 196 of the Companies' Act of 1862, became subject to all the provisions, so far as they are applicable to the present case, of the Colonial Companies' Act, in the same manner in all respects as if it had been formed under that Act.

The articles of association contained no restriction or limitation on the Company's power of borrowing. As regards the Directors, however, their authority to borrow was limited ; for it was expressly stipulated by article 50 of the association, which were registered under the Companies' Act, and of which the Bank was bound to take notice, " that, subject and without prejudice to the power therein given to the meetings of shareholders, and the conditions and restrictions therein contained

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the Directors for the time being should have, amongst others, the following powers,—that is to say, the power of borrowing and taking up, on the credit of the said Company, or of its property, any sum or sums of money from time to time, but so, nevertheless, that the total amount to be so taken up should not exceed in the aggregate, *as an existing debt at the same time* one half of the then actually paid-up capital of the said Company, and that for the purpose of securing any sum or sums which might be so borrowed by the Directors, they should be at liberty to mortgage, with or without power of sale, and otherwise to charge and incumber all or any part of the property, estate, and effects, real and personal, of the said Company, and to accept, make, or indorse, any bill of exchange or promissory note on behalf of the said Company, or to overdraw the account of the said Company at their bankers, or to execute and give any bond, covenant, or other obligation binding the said Campany, and the affairs and concerns of the said Company, both in India and Victoria and elsewhere, and that the entire and sole management, conduct, and regulation of the business and affairs of the said Company, both in India and Victoria and elsewhere, according to the provisions and subject to the restrictions of the said articles of association, should be confided to, and be under the direction of, the said Directors for the time being, who should have and might exercise all the powers which might be exercised by the whole of the shareholders."

It was, therefore, clearly beyond the authority of the Directors to borrow or take up, upon the credit of the Company as an existing debt at the same time, an amount or amounts exceeding one-half of the actually paid-up capital of the Company. There is no doubt that the authorty of the Directors, limited as it was by the articles of association, was capable of being extended under the provisions of article 31. But by that article one-half of the votes of all the shareholders given at a general meeting called for the purpose was necessary.

The article is in the following words :—" One-half of the votes of all the shareholders given at a general meeting called for the purpose shall be competent *and necessary* to make, to enlarge, extend, rescind, alter, or repeal, wholly or in part, all or any of

the provisions or powers herein contained, or to remove any Director or trustee, or to increase or diminish the number of Directors; but upon all other questions or business to be transacted at any meetings (except as herein specially mentioned) a majority of the votes of the shareholders present in person or by proxy and not declining to vote shall decide."

It was not contended that the authority of the Directors either to borrow or to mortgage was ever extended at a general meeting of the shareholders called for the purpose, but it was contended by the learned Counsel for the respondents that the limitation of the power of borrowing and of mortgaging, contained in article 50, was merely a limitation of the authority of the Directors conferred by the same article; that it was not part of the constitution of the Company, which, if the Company had been originally formed under the Companies' Act of 1862, must have been contained in the memorandum; and, consequently, that it was not a limitation of the general powers of the Company or of the whole body of shareholders; and that the acts of the Directors in excess of their authority might be ratified by the Company and rendered binding.

Their Lordships are of opinion that the above contention is correct, and they will proceed to consider whether the acts of the Directors in borrowing in excess of their authority were ever duly ratified by the Company.

The learned Recorder considered that there was sufficient evidence to show that the shareholders acquiesced in and approved of the acts of the Directors in borrowing and mortgaging, and he relied upon what took place at the half-yearly meetings held in 1868 and 1869.

A ratification is in law treated as equivalent to a previous authority, and it follows that, as a general rule, a person, or body of persons, not competent to authorise an act, cannot give it validity by ratifying it.

By the 21st of the articles it is provided that an ordinary half-yearly meeting shall be held during the months of October and April in each year. By the 22nd, that an extraordinary general meeting may be called at any time for a special object By the 25th, that a notice shall be sent to each shareholder,

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stating the day and place of the meeting, and "also the business proposed to be transacted thereat." By the 26th, that at every general half-yearly meeting the accounts and a statement of the Company's affairs, &c., shall be laid before the shareholders, and such meeting "may examine, allow, and confirm, or reject the accounts and report of the Directors or auditors, so as to bind all the members for the time being of the Company, and all persons claiming under them." The notice that a half-yearly meeting was to be held would sufficiently indicate that it was for the purposes mentioned in article 26, but would not indicate that it was for any other purpose.

The report of the Directors referred to in article 26 seems to their Lordships the same thing as the statement of the Company's affairs previously mentioned in the same article. There is nothing in the articles requiring the Directors to circulate the reports among the shareholders before the meetings. Their is no evidence in the case that the reports were in fact circulated before the half-yearly meetings, and the form of the reports bearing dates on the days of the half-yearly meetings looks as if they were produced for the first time when laid before those meetings.

Their Lordships think that it would be competent for a majority of the shareholders present (though not a majority of the shareholders of the Company), at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the Directors in excess of their authority; and they are not prepared to say that, if a report had been circulated before a half-yearly meeting distinctly giving notice that the Directors had done an act in excess of their authority, and that the meeting would be asked, by confirming the report, to ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half-yearly meeting.

But if the object was to give the Directors in future an extended authority beyond what is given by article 50, their Lordships think that it would be an alteration of the provisions contained in the articles which, under clause 31, that could

only be made by a vote of one-half of all the shareholders of the Company.

There is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future. This distinction must be borne in mind in considering whether the ratifications at the half-yearly meetings of particular acts done previously to those meetings gave validity to acts of a similar character done subsequently. For instance, it is important in considering whether the ratification at the half-yearly meeting, held on the 30th April 1868, of the act of the Directors in borrowing 13,000*l.*, when 10,000*l.* previously borrowed remained unpaid, if made out, so far extended the powers of the Directors as to authorize them to take up, as an existing debt at the same time, a further sum of 23,000*l.* when the sums of 13,000*l* and 10,000*l.* should have been paid off, notwithstanding the provisions of article 31, which rendered the votes of one half of all the shareholders to be given at a general meeting necessary to enlarge or extend any of the powers contained in the articles.

Their Lordships are of opinion that the ratification at a half-yearly meeting of a particular act in excess of authority would not extend the authority of the Directors so as to authorize them to do similar acts in future.

Their Lordships have now to apply the above principles to the facts of the case.

The moneys claimed in the present suit were advanced in February 1871, 10,000*l.* under the letter of credit No. 130, and 5,000*l.* under the letter of credit No. 153. The balance remaining due of all sums previously advanced by the Bank had been reduced at the end of 1870 to 8*l.* 8*s.* 9*d.* The last general half-yearly meeting of the Company was held on the 13th October 1869. At that meeting the Directors submitted their report for the period ending the 30th June 1869, and that report was adopted. According to the evidence the letter of credit No 153 was issued on the 9th September 1869. The fact of the Directors having obtained that letter of credit could not and did not appear in the report of the Directors for the period ending June 1869, and the act of obtaining that letter of credit or of borrowing

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money thereon does not appear to have been ever reported or made known to the shareholders, or ratified by them. The claim, therefore, as to that 5,000*l.* must be rejected, unless the ratification of the act of the Directors in obtaining previous letters of credit for 10,000*l.* and 5,000*l.* Nos. 130 and 141, as stated in the report of 29th October 1868, which was ratified at the half-yearly meeting held on that date, authorized the Directors to obtain the letter of credit No. 153 after the letter of credit No. 141 of the 11th September 1868, for 5,000*l.*, referred to in that report, had been paid off.

Their Lordships are of opinion that the ratification of the report of 29th October 1868 did not authorize the Director. to obtain the letter of credit No. 153, or to borrow the 5,000*l* now claimed as having been advanced thereon on the 11th of February 1871. The sum of 5,000*l.* advanced on the 17th February 1871, on letter of credit No. 153, must, therefore, be disallowed.

The only item remaining to be considered is the 10 000*l.* advanced on the 11th February 1871, on the letter of credit No. 130. That letter of credit, according to the evidence, was obtained on the 23rd December 1867. It authorized the Chartered Bank of India, Australia, and China, in Rangoon, they then being the agents there of the Union Bank, to honour the Rice Company's drafts through their manager, Mr. Jamieson, on the Union Bank of Australia in London, to the extent of 10,000*l.*, *at any time until the 29th March* 1869.

The obtaining of that letter of credit was mentioned in the report of the Directors, presented at the meeting of the 29th October 1868.

The following is the statement contained in the report:—"In addition to the Bank credit for 10,000*l.*, with which Mr. Jamieson had been hitherto furnished to enable him to conduct the financial wants at Rangoon, another credit for 5,000*l.* has been forwarded, which Mr. Jamieson advises will be of great assistance in his operations." That report was read and adopted at the said meeting.

It did not necessarily follow because a letter of credit for 10,000*l.* was obtained, that the Directors would act upon it, in

violation of article 50 by taking up upon it an amount exceeding in the aggregate as an existing debt at the same time more than one-half of the paid-up capital of the Company. The Directors did not exceed the authority conferred upon them by the articles of of association by obtaining the letter of credit; the excess of authority was in taking up upon it a sum in excess of the amount which they were authorized to borrow.

Under the letter of credit a sum of 5,000*l.* might have been taken up and paid off, and then another sum of 5,000*l.* taken up under it, without an excess of authority.

At the time of the adoption of the report on the 29th of October 1868 the letter of credit then existing was to expire on the 29th March 1869. It was not mentioned in the report that the credit obtained was to expire on that day, but every shareholder must have known that letters of credit, in practice, are for a limited time. It is not at all unusual, but it is not a matter of course, to extend the time if the original credit has not been acted upon.

Even if the adoption of the report mentioning the credit for 10,000*l.* authorized the borrowing at one time of the whole amount (which their Lordships are disposed to think it did not), it by no means follows that it authorized the renewal of the letter of credit and the acting upon it after the time originally limited had expired.

There was nothing in the report to lead to the supposition that the Directors had any intention to renew the letter of credit or to borrow money upon it after the 29th March 1869. The shareholders present at the half-yearly meeting might have had very good reasons for considering that it was expedient to obtain a letter of credit for 10,000*l.*, or even to borrow upon it 10,000*l.* at one time during the currency of the letter of credit, without considering whether it would be prudent or advisable to borrow 10,000*l.* at one time on the 11th February 1871, more than two years after the date of the meeting of October 1868, and when the Company might possibly consist of an entirely different body of shareholders.

But, however this may be, their Lordships are of opinion that there was no evidence to show that any sufficient notice of the

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substance or effect of the reports, which were intended to be presented at the half-yearly meetings above referred to, was given to the shareholders of the Company in pursuance of the 25th clause of the articles of association so as to lead the absent shareholders to know, or even to imagine, that the Directors intended to report that they had exceeded their authority, or that by the adoption of the report of the Directors, to be laid before the meeting, an act of the Directors in excess of their authority could be rendered binding upon the whole body of shareholders.

Their Lordships being of opinion that the act of borrowing in excess of authority was never ratified, it is not necessary to consider whether, if it had been duly ratified, the property of the Company would have become charged as a security for the repayment of the amount.

The case of *The Royal British Bank* v. *Turquand* (1) and the same case in error (2), were cited in the course of argument to show that the excess of authority was a matter only between the shareholders and the Directors, and that it does not affect the rights of the Bank. In that case it was said by C.J. Jervis: "We may now take it for granted that the dealings with these Companies are not like dealings with other partnerships, and that parties dealing with them are bound to read the Statute and the deed of settlement; but they are not bound to do more. The party here" (that is in *Turquand's* case) "on reading the deed of settlement would find not a prohibition from borrowing, but a permission to do so on certain conditions." In the present case, if the Bank had referred to clause 50 of the articles of association they would have found that the Directors were expressly prohibited from borrowing beyond a certain amount.

The case of *The Royal British Bank* v. *Turquand* (1) was decided with reference to a Company registered under 7 and 8 Vict., c. 110, and Chief Justice Jervis remarked that the lender, finding that the authority might have been made complete by a resolution, would have had a right to infer the fact of a resolution authorising that which on the face of the docu-

(1) 5 E. & B., 248. (2) 6 E. & B., 327.

ment appeared to be legitimately done. In the present case, however, the Bank would have found that, by the articles of association, the Directors were expressly restricted from borrowing beyond a certain amount, and they must have known that if the general powers vested in the Directors by article 50 had been extended or enlarged by a resolution of a general meeting of the shareholders under the provisions of s. 31, a copy of that resolution ought, in regular course, to have been forwarded to the Registrar of Joint-Stock Companies, in pursuance of s. 53 of the Companies' Act, and would have bee found amongst his records.

Their Lordships are of opinion that the learned Recorder was correct in holding that this case is different from that of *The Royal British Bank* v. *Turquand* (1).

It is unnecessary to consider what would have been the rights of the Bank if the amount which they advanced had not been more than one-half of the actual paid-up capital, but had been advanced at a time when an unpaid debt on account of moneys previously borrowed from other persons, together with the money lent by the Bank, would have exceeded the amount which the Directors were authorized to borrow. In the present case, the 10,000*l* and 5,000*l*. were both lent by the Bank itself.

It was argued that the advances made by the Bank under the letter of credit did not amount to a lending by the Bank or a borrowing by the Directors. There is nothing in that objection. If, however, it was not a borrowing, the Directors had no power to pledge the property sought to be affected by the equitable mortgage as a security for the repayment of it. It was only for securing moneys borrowed that the Directors were authorized to mortgage or charge the property of the Company.

For the above reasons their Lordships are of opinion that the plaintiffs are not entitled as against the defendant to a charge on the property beyond the amount of one-half of 17,100*l*., the paid-up capital of the Company.

The amount, therefore, allowed to the plaintiffs by the decree of the lower Court must be reduced, and their Lordships will humbly advise Her Majesty that the decree be reversed, and

(1) 5 E. & B, 248.

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that it be declared that the plaintiffs had a valid equitable mortgage on the property mentioned in the plaint for the principal sum of 8,550*l.* only.

It was objected at the hearing on the part of the appellant that the decree ought to have been for a foreclosure, and not for a sale, but at the close of the case their Lordships were informed that the property had been sold under the decree, and that the money had been deposited in Court; and that the appellant does not object to the sale.

Their Lordships will, therefore, further advise Her Majesty that it be ordered that the costs of the suit in the lower Court, both of the plaintiffs and of the defendant respectively, as taxed by the lower Court, be paid to the said parties respectively out of the proceeds of the sale of the property which are now in Court, and that out of the balance of such proceeds there be paid to the plaintiffs a sum of rupees equivalent, at the rate of exchange current between Rangoon and England at the time of the filing of the suit, to the principal sum of 8,550*l.*, with interest thereon at the rate of 8 per cent, from the 5th of October 1872 to the date of the sale of the property, together with a proportionate part of the accumulations, if any, of the proceeds of the sale, and that the residue of the said proceeds and of the accumulations thereon, if any, be paid to the defendant, appellant.

The respondents must pay the costs of this appeal.

Decree varied.

Agents for the appellant: Messrs. *Lawford* and *Waterhouse.*

Agents for the respondents: Messrs. *Murray, Hutchins,* and *Co.*

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Mitter.

BHAGO BIBEE AND OTHERS (DEFENDANTS) *v* RAM KANT ROY CHOWDHRY AND OTHERS (PLAINTIFFS).*

1877 *August* 9.

Sale for arrears of Revenue—Undertenure, Suit to avoid—Permanent Settlement—Structures and Improvements within the meaning of excep 4 to s. 37 of Act XI of 1859—Decree for ejectment.

In a suit to avoid an undertenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the Permanent Settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under exceptions 1 and 4 to s 37 of Act XI of 1859, but the lower Court gave a decree to the plaintiffs and annulled the undertenure *Held* by WHITE, J, that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding

Brojo Soondur Biswas v *Gouri Persaud Roy* (1) followed

Moonshi *Serajul Islam* for the appellants.

Babu *Aukhil Chunder Sen* for the respondent

The facts and arguments in this case are fully set forth in the judgment of

WHITE, J.—This was a suit brought by the special respondents against the special appellants (who are grouped together as first party defendants in the first Court) to avoid an undertenure in certain villages, part of an entire mehal, which the respondents had jointly with second party defendant purchased at a Government revenue sale, and which villages, on partition, fell to the

* Special Appeal, No 1892 of 1876, against the decree of Baboo Nobin Chunder Pal, Second Subordinate Judge of Chittagong, dated the 29th May 1876, modifying the decree of Moulvi Ali Ahmud, Munsif of Sitakoond, dated the 30th April 1875.

(1) S. D. A, Dec 1852, p. 645

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share of the respondents. The written statement of the added defendants, Sohina Bibi and Nowa Bibi and Korban Ali, which embodies the case of the special appellants, after stating that a certain portion of the lands claimed are not in their possession or belong to their undertenure, as regards the rest of the disputed lands (comprising 6 kanees 5 gandas), claims in effect the benefit of the exceptions in s. 37 of Act XI of 1859. It is alleged, first, that the undertenure comes within the first exception, as it is a mokurari taluk held at a fixed rent from the time of the Permanent Settlement; and, secondly, that there are permanent holdings and other improvements on the disputed lands, which are further protected by the 4th exception of s. 37 of Act XI of 1859.

In proof of the antiquity and nature of the undertenure, the defendants produced an old talukdari potta of the 15th Jait 1155 M, and certain dakhilas.

The first Court did not pronounce any decided opinion as to the genuineness or otherwise of these documents, but was of opinion that the potta, if proved, was not of sufficient antiquity to establish the defendants' claim to exemption under the first exception. Being, however, of opinion that the defendants were at all events entitled to a right of occupancy in the lands comprised in the potta, the first Court held that the plaintiffs could not recover khas possession, and were only entitled to rent, and decreed accordingly.

The lower Appellate Court has reversed the decree, and awarded to the plaintiffs possession of the lands, and thus in effect annulled the undertenure.

Two objections are taken by the defendant No. 1 in special appeal: one is, that the Judge has defectively investigated their claim to exemption under the first exception in s. 37, inasmuch as he has not found whether their potta and dakhilas are genuine or the reverse, and inasmuch as it mainly depends upon the result of that enquiry whether their claim to exemption is made out or not. The judgments of the lower Appellate Court on this point runs thus:—"The defendants' taluk does not come under the exceptions mentioned in s. 37, Act XI of 1859. Whatever right they had having been sold at auction for

arrears of rent, all the incumbrances formerly imposed have ceased to exist. Hence, whatever may be the length of their possession, it cannot be maintained."

We think the objection taken by the special appellants is well founded. The first Court came to no positive finding as to the proof of the potta and dakhilas; but decreed in favour of the defendants on other grounds. We are unable to gather from the decree of the lower Appellate Court how it has dealt with the documentary evidence adduced by the defendants, or whether it considered it at all; or if it held the potta to be proved, what weight it gave to it in its decision, or whether it gave it any weight. If the potta is found to be genuine, it is certainly a document of the utmost importance in the case, for it appears to be confirmatory of a previous potta, and although its date falls short of the date of the Permanent Settlement by a short period of time, the document, if genuine, furnishes ample evidence from which the Court may presume that the undertenure existed at the time of the Permanent Settlement.

As the potta purports to be more than thirty years old, its mere production constitutes *primâ facie* proof of its execution, if it is produced from the proper custody; and if the potta is produced by the special appellants and relates to the undertenure, of which they are, and their predecessors have been, in possession, the custody is proper. The law on the subject, which is similar to the English law, is to be found in s. 9 of the Indian Evidence Act, 1872. We draw attention to the above matters, because the first Court appears to have fallen into errors on both these points.

We may add also that the first Court was mistaken in supposing that the defendants in this case had a right of occupancy irrespective of their undertenure. No such right was claimed or proved by the defendants, and such a right cannot be presumed to exist merely because the defendants have occupied for a long period of time under a *taluki* potta.

The second objection taken is, that assuming the undertenure not to fall within the first exception of s. 37, yet that, as regards so much of the lands comprised in it as is covered with permanent buildings and other improvements, the defendants are

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entitled to exemption from ejectment under the 4th exception of that section.

It has been decided by this Court in the case of *Shaik Tofail Ally* v. *Ram Kanto Roy Chowdhry* (1) and three other appeals of the same year, that, notwithstanding a party may fail to show that his tenure comes within any of the first three exceptions of s. 37, yet that he is entitled to the benefit of the 4th exception in respect of any dwelling-houses or other permanent structures that may be upon his holding. These decisions are based upon an old decision of the Sudder Dewany Adawlut in the case of *Brojo Soondur Biswas* v. *Gouri Persaud Roy* (2).

If this matter had not been the subject of previous decision by this Court and of the late Sudder Court, I should not, speaking for myself, be prepared to accede to this interpretation of s. 37 without much further argument on the point. But as there appears to be no conflicting decisions on the point, and the rulings of this Court have unquestionably a tendency to encourage improvements on the land, and to mitigate the severity of the Revenue Sale Law, I am willing to acquiesce in their application to the present case.

The claim of the special appellants under the 4th exception of s. 37 is to be found in the 4th paragraph of the defendants' written statement to which I have above referred. It mentions, amongst other things, land for *nij* cultivation, but that item does not come under the exception. As regards the remaining items contained in that paragraph, the lower Appellate Court must enquire into their existence, and in the event of its finding that in consequence of non-proof of the existence of the undertenure at the time of the Permanent Settlement, the plaintiffs are entitled to annul the undertenure, the Court will limit the recovery of possession by the plaintiffs to such lands comprised in the tenure as are applied to agricultural purposes; but as regards the remaining land on which any structures are erected or improvements made of the character mentioned in the 4th exception of s. 37, the Court will declare the first party defendants entitled to retain the same, they paying rent for the same.

(1) Special Appeal, No. 1796 of 1876. (2) S. D A., Dec., 1862, p. 645, unreported.

on them were final, and it was made lawful for the Lieutenant-Governor to direct that an appeal shall lie in any class of civil suits or criminal trials from any officer appointed under the Act to any other officer appointed under the same. There was separate provision made for appeals being allowed in like manner by the direction of the Lieutenant-Governor between the officers of those pergunnahs *inter se*, and authority was also reserved to direct that any class of criminal trials should be referred for sanction to the Sudder Court. The effect of these sections, it seems to me, was absolutely to take away the right of appeal under the general law in all civil suits tried and determined in the Sonthal Pergunnahs, save only in such cases as might be provided for by order of the Lieutenant-Governor of Bengal; and it does not seem to be the case that the Lieutenant-Governor, by his order, did make any case tried in the Sonthal Pergunnahs appealable to the Sudder Court. That was the state of the law down to 1874, when, on the 8th December 1874, Act XIV and Act XV were passed, the one called "the Scheduled Districts Act," and the other "the Laws' Local Extent Act." By the former of these Acts, the Sonthal Pergunnahs find their place among the Scheduled Districts of Bengal, and Act XXXVII of 1855 was repealed. By the second of these Acts, s. 3, the Acts mentioned in the first schedule, one of which is the Code of Civil Procedure, Act VIII of 1859, were declared to be in force throughout the whole of British India except the Scheduled Districts, and it is only by the provisions of the Code of Civil Procedure that, generally speaking, the right of appeal arises in civil suits and proceedings. That being the general state of the law, it would lie upon the appellant to show that, according to s. 8, cl. (*c*), of the Laws' Local Extent Act, that any Act or Regulation allowing general right of appeal had been previously extended, or had been declared to be in force, in any of the Scheduled Districts. That I think is not very likely, considering that the very essence of Act XXXVII of 1855 was to take away such appeals, and consequently it would be for the appellant to show that, by any other Regulation made before or since the passing of Act XV of 1874, an appeal to the High Court had been

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specially allowed. Nothing of the kind has been brought to our notice. It appears to me, therefore, that, so far as our present information extends, we have no jurisdiction to entertain an appeal, and that the appeal must be disallowed. Considering first our want of jurisdiction, and in the next place that the objection which has been taken was suggested by the Court, we think the dismissal of the appeal should carry no costs.

WHITE, J.—It appears to me that we have no jurisdiction in this case. Under Act XV of 1874, the Sonthal Pergunnahs is one of the Scheduled Districts to which Act VIII of 1859, *viz.*, the Civil Procedure Code, does not extend. Looking to the exceptions mentioned in s 8 of Act XV of 1874, it is possible that, notwithstanding this, Act VIII of 1859 may, prior to Act XV of 1874 coming into force, or subsequent thereto, have been extended to, or declared to be in force in, the Sonthal Pergunnahs by the Governor-General in Council or the Local Government. But it is for the appellant to satisfy the Court on these points, which he has not done. *Primâ facie*, therefore, the jurisdiction of this Court is taken away, and the appellant not having shown that Act VIII of 1859 was, before or after 1874, extended to the Sonthal Pergunnahs, we must hold that we have no jurisdiction.

Appeal dismissed.

Before Mr. Justice Birch and Mr. Justice R. C. Mitter.

1877 *July* 6.

BHOOBUN CHUNDER SEN (ONE OF THE DEFENDANTS) *v.* RAM SOONDER SURMA MOZOOMDAR AND OTHERS (PLAINTIFFS).*

Sale for arrear of Revenue—Suit to set aside—Fraud—Act XI of 1859—*Limitation—Agent—Contract Act (IX of* 1872), *ss.* 182 *and* 185—*Form of Decree.*

When one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears under Act XI of 1859, and purchased it in the *benami* of his son,—*Held*, that another co-sharer aggrieved by the sale could maintain a suit to have the property reconveyed, though the period limited by

* Regular Appeal, No 139 of 1876, against the decree of Baboo Nobin Chunder Ghose, Roy Bahadoor, Second Subordinate Judge of Zilla Mymensingh, dated the 17th of March 1876.

s. 33 of Act XI of 1859, and art. 14 of the second schedule to Act IX of 1871, for a suit to set aside the sale, had expired.

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SUIT to set aside an auction-sale held under the provisions of Act XI of 1859 on the ground of fraud.

The plaintiffs alleged that they jointly with the second defendant were owners of a certain settled mehal; that the second defendant, who was also their agent, they being purdanushin ladies, fraudulently allowed the Government revenue of their portion of the estate to fall into arrears; that he led the other co-sharers, who were ready to make the payment on their (the plaintiffs') behalf to suppose he was going to save the estate from sale; but that instead of doing so, he allowed the estate to be put up for sale without notice to the plaintiffs, and on the day of sale, the 30th December 1872, after making false representations to those present as to the condition of the estate, purchased in the name of his son, the third defendant, for a small consideration. The plaint was filed on the 31st March 1875. The second and third defendants pleaded, *inter alia*, that the suit, being to set aside a sale for arrears of Government revenue, should have been brought within one year from the date on which the sale was confirmed by the Commissioner, and that not having been so brought. it was liable to be summarily dismissed. The plaintiffs obtained a decree in the first Court.

The third party defendant appealed to the High Court.

Baboo *Kally Mohun Dass*, Baboo *Bhoobun Mohun Dass*, and Baboo *Jogesh Chunder Dey* for the appellant.

Baboo *Mohini Mohun Roy* and Baboo *Nullit Chunder Sen* for the respondents.

The following judgments were delivered—

BIRCH, J. (after stating the facts, continued as follows): I do not treat the suit as one brought to annul the sale on the ground of its having been made contrary to the provisions of Act XI of 1859. What the plaintiff seeks to establish in this suit

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is, that by the fraud of the defendant they have been deprived of their property, and they ask to be relieved from the effect of that fraud and to be placed in the position in which they were before the auction-sale took place. To such a suit the provisions of Act XI of 1859 in restriction of suits to annul sales cannot, in my opinion, be extended. We have to look to the general law of limitation, and treating this as a case for relief on the ground of fraud, the suit is clearly within time. [His Lordships then proceeded to deal with the facts of the case.]

The Subordinate Judge has decreed the suit and ordered that the plaintiffs obtain possession of the share claimed with costs and interest thereon from defendants 2 and 3. He has also made the said defendants liable for the costs of Government with interest.

I take the same view of the evidence as the Subordinate Judge has. But I think that the form of the decree must be different. Our order will be that the defendant No. 3 do reconvey to the plaintiffs the property which is the subject of this suit, upon receiving from them the sum of Rs 220 with interest thereon at 4 per cent. from the date of payment thereof; that the cost of the stamp for conveyance and the registration thereof be borne by the defendant No. 3; that in default of the conveyance being executed within two months from the date of this decree, the conveyance be executed by the Court, the costs of the transaction being added to the costs of this appeal. The order of the lower Court is modified. The costs in this Court to be borne by defendant No. 3 with interest at 6 per cent. The order of the Subordinate Judge as to costs in the lower Court will stand.

MITTER, J.—I am also of opinion that the plaintiffs in this case upon the facts, which appear to me to have been satisfactorily established by the evidence, are entitled to recover possession of the share of the zemindary for which this suit has been brought, and to obtain a conveyance of the same from the defendant, appellant.

Although in the plaint there is also a prayer for the reversal of the auction-sale, I do not think that, under the circumstances of this case, that prayer can be granted.

In this view of the case, it does not fall within the provisions of art. 14 of the second schedule of the Limitation Act, or s. 33 of the Revenue Sale Law. It should be considered simply a suit to obtain a certain relief on the ground of fraud, and consequently art. 95 is applicable to it. Putting the case, therefore, in the most favourable position as regards the defendants, the knowledge of the fraud cannot possibly date back further than the date of the auction-sale. The present suit having been brought within three years from that date is, therefore, not barred by limitation.

The mehal seems to have been sold for an arrear of five annas of the revenue kist of September 1872. It is stated by the plaintiffs that Bhim Narain, second defendant, father of Bhubun Chunder, defendant No. 3, the appellant before us, was entrusted by all the co-sharers with the entire management of the estate; and that it was his duty, therefore, to see that the whole of the revenue due in that kist was paid. But upon the evidence I am not prepared to say that this part of the plaintiffs' case has been established. I am inclined to believe that it was not a premeditated default on the part of any one of the co-sharers to further a fraudulent scheme. It was merely the result of an accidental negligence on the part of some one of the co-sharers. It is deposed to by the plaintiffs' witnesses themselves that one Hurry Dass Chuckerbutty was employed by some of the co-sharers, for instance, Wooma Soondery and Bissessuri, two of the plaintiffs in this suit, to deposit in the Collectorate their proportionate shares of the revenue. The evidence as to the whole mehal being in the possession of Bhim Narain on behalf of the rest of the co-sharers is neither clear nor satisfactory. But upon the evidence I am satisfied that, shortly before the day of the sale, the defendant Bhim Narain undertook to make an attempt to save the mehal from the impending auction-sale by putting in an application to the Collector under s. 6 of the Revenue Sale Act on behalf of all the co-sharers.

The learned pleader for the appellant has drawn our attention to several discrepancies in the depositions of the plaintiffs' witnesses upon this point, but these discrepancies, far from

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affecting their credibility, appear to me to be such as would naturally occur in the statements of truthful witnesses speaking to events which had happened some time before.

I am of opinion, therefore, that it has been well established in this case that before the auction-sale Bhim Narain undertook to make an application on behalf of all the co-sharers under s. 6 of Act XI of 1859. He was employed for this purpose by one of the co-sharers, *viz.*, Radha Kissen Surma Mozoomdar, a witness in this case, and Haranund Nundi, another witness of the plaintiffs, who came to Nusseerabad on their behalf to protect their interests after the mehal had fallen into arrears. Bhim Sein, I think, having accepted this engagement became an "agent" of the plaintiffs for this special purpose within the meaning of s. 182 of the Contract Act. It is said that this was a mere gratuitous offer on the part of Bhim Sein, and there was no consideration for it. But that circumstance would not take away from him the character of an "agent;" see s. 185.

Now it is clear from the evidence that Bhim Sein intentionally, and with a view to cause wrongful loss to the plaintiffs and equally wrongful gain to himself, neglected to perform his duties as an "agent." He not only omitted to make an application to the Collector as he undertook to do, but by fraudulent misrepresentations prevented others from making a similar application on behalf of the plaintiffs. I entirely concur with the lower Court in its opinion that the statements of the plaintiffs' witnesses, Chunder Nath Dey, Ram Gopal Nag, and Brojnath Bose, are fully reliable upon this point; they prove beyond doubt that, on the day of auction-sale, Bhim Sein in the Collector's cutcherry showed them a petition which he said he would present to the Collector as soon as he would come to Court. They went away with this assurance.

It is evident from the deposition of the plaintiffs' witness No. 4, Juggobundhoo Bose, that these representations were falsely made by Bhim Sein to successfuly carry out a fraudulent scheme of purchasing this mehal in the *benami* of his son. He had with him at that time a muktarnamah executed by his son, who was not at Nusseerabad, but at his house, which was at some

distance for that place, empowering the witness Juggobundhoo to bid for the property at the impending auction-sale. Then we have the fact clearly established that when the Collector came to Court, he did not make even any show of attempt to save the property. These facts leave no reasonable doubt in my mind that Bhim Sein accepted the agency on behalf of the plaintiffs to make an application under s. 6 of Act XI of 1859 with a view that he might with more facility carry out his intention of purchasing the property himself. This was clearly a fraud against the plaintiffs, and under these circumstances, it seems to me just and equitable that Bhim Sein should not be allowed to reap the benefit of his fraud. The plaintiffs are therefore entitled to the relief proposed to be given by my learned colleague.

Appeal dismissed.

Before Mr. Justice Kemp and Mr. Justice Lawford.

KUDOMEE DOSSEE AND OTHERS (DEFENDANTS) *v.* JOTEERAM KOLITA (PLAINTIFF).*

1877 *August 27.*

Hindu Law—Divorce—Established Custom.

Where a Hindu husband sued his wife for restitution of conjugal rights, and the defendant pleaded divorce, it was *held*, that though the Hindu law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law.

THE plaintiff in this case, who was a Hindu inhabitant of Assam, sued the female defendant, one of the special appellants in the High Court, for restitution of conjugal rights. The defendant, among other pleas, averred that the plaintiff had divorced her, and had executed a deed to that effect, and that he, consequently, was not entitled to maintain this action.

* Special Appeal, No. 2812 of 1876, against the decree of W. E. Ward, Esq., Officiating Judge of Assam, dated the 6th September 1876, reversing a decree of Baboo Huro Kanto Surma, the Munsif of Gowhatty, dated the 30th March 1876.

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The Munsiff dismissed the case of the plaintiff, holding that there was a custom in the Province of Assam "for men and women to assent to divorce by deed in this way." On appeal the Judge held that the Hindu law of Bengal proper applied to Assam, and inasmuch as the Hindu law forbids divorce, even if such a custom should exist, of which there was no evidence, it would not override the law. Accordingly, he reversed the decision of the Munsif, and awarded a decree to the plaintiff. The defendants preferred a special appeal to the High Court.

Baboo *Bhobun Mohun Dass* appeared for the appellant.

The respondent did not appear.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts, continued as follows) :— In special appeal it is contended that the Judge committe an error in law in holding that in Assam a Hindu cannot divorce his wife, and that he has also erred in law in holding that a custom, if proved, cannot have the force of law so as to override the Hindu law; further, that if the Judge thought there was no evidence of the custom, he should have remanded the case to the first Court for the purpose of taking evidence on that point. We think that the Judge was right so far in holding that the Hindu law does not contemplate divorce; but we think that he was clearly wrong in holding, as he has done, broadly, that a custom, even if established, cannot override the general provisions of the Hindu law. There can be no doubt that the Hindu law has been affected in particular districts by particular usages, and these usages have hitherto been respected unless clearly repugnant to the principles of Hindu law: see page 387 of Shama Churn's Vayvastha Darpana. The text lays down that "reason aud justice are more to be regarded than mere texts, and that wherever a good custom exists it has the force of law."

We, therefore, think that the Judge was wrong in holding, as he has done, that even if the custom were established, it would not affect the Hindu law. Now the Munsif has found that there is evidence of this custom, and that it exists in the province;

and we think that the Judge ought to have found on that part of the case, namely, whether the defendant No. 1 had established the custom set up by her in her defence. We, therefore, remand the case to the Judge to come to a finding on that point, taking evidence if necessary. Costs to follow the result.

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Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice White.

GOLUKNATH MISSER (PLAINTIFF) *v.* LALLA PREM LAL AND OTHERS (DEFENDANTS).*

1877 *Sept.* 14.

Mortgage, Effect of subsequent Mortgage—Extinguishment—Merger.

A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.

Baboo *Mohini Mohun Roy*, Baboo *Tarucknath Dutt*, and Babu *Jugguddoollabh Basack* for the appellant.

Mr. *R. E. Twidale* and Baboo *Tarucknath Palit* for the respondents.

THE facts of this case are sufficiently stated in the judgment of the Court.

WHITE J. (JACKSON, J., concurring).—It appears that in this case the defendants (who are grouped together as No. 1) borrowed from the special appellant (who is the plaintiff in the suit) on the 13th of Srawun 1271 F.S., Rs. 295 at 2 per cent. per mensem, and by a mortgage bond of that date, in order to secure the payment of that sum with interest, mortgaged to the plaintiff certain land which is described in the mortgage bond

* Special Appeal, No. 2054 of 1876, against the decree of E. S. Mosely, Esq., Officiating Judge of Zilla Bhagalpore, dated the 6th of July 1876, affirming the decree of Baboo Gopinath Matey, Sudder Munsiff of that district, dated the 4th of December 1875.

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as "20 bighas of '*Inglis*' land belonging to us exclusively," (meaning defendants No. 1),—"that is to say, 10 bighas out of 50 bighas in Mouzah Kuchia, and 10 bigas in Mouzah Dowlutpore." Certain payments on account of the interest were made as appears by the endorsement on the bond; but in 1278 F S. the whole of the principal sum and a large arrear of interest still remaining unpaid, the parties came to an adjustment of account, when Rs. 500 was found to be due for principal and interest upon the foot of the bond, and thereupon the defendants No. 2 executed to the plaintiff another mortgage bond to secure payment of the Rs. 500 with interest on that sum at the reduced rate of 1 per cent. per mensem. This second bond is dated the 21st of Bysack 1278 F S. It mentions the previous mortgage bond, and the properties mortgaged by it are the same as those in the previous mortgage bond, with the addition of another 10 bighas out of the 50 bighas in Mouzah Kuchia. The schedule annexed to the bond states in effect the mortgaged properties to be 30 bighas of land composed of 20 bighas out of 50 bighas in Mouzah Kuchia and 10 bighas in Dowlutpore.

Shortly before this second mortgage bond was executed to the plaintiff, namely, on the 9th of Assin 1277, the defendants No. 1 mortgaged the whole 60 bighas of land to the special respondent (who is defendant No. 2) for Rs. 1,550 with interest at Re. 1-4 per cent. per mensem. The mortgage was in the form of conditional sale, and provided that, on failure to pay that sum together with the interest within four year's defendant No. 2 was to be at liberty to foreclose the mortgage and take possession of the property sold. The property in the respondent's conditional sale is described as 50 bighas in Mouzah Kuchia and 10 bighas in Mouzah Jamulpore, which is another name for Dowlutpore.

On default being made, the defendant No. 2, in December 1873, took proceedings to foreclose the mortgage, which resulted in his getting into possession of the whole 60 bighas.

The plaintiff brings this suit to establish a lien or charge in his favour upon 30 bighas of the land in the possession of defendant No. 2, and he claims Rs. 7,268 as the amount due upon the footing of his second mortgage bond: at the same time

he insists in his plaint that his previous mortgage of 1271 continues in force.

As the doctrine of taking does not prevail in the mofussil of this Presidency, the plaintiff cannot avail himself of his second mortgage, which was subsequent to the conditional sale to the defendant No. 2; but the question remains whether, by reason of the plaintiff having taken the second mortgage of 1278, he has lost the priority which at the time when the conditional sale was made he unquestionably had under his previous mortgage of 1271; in other words, whether his previous mortgage has become merged or extinguished by his subsequent mortgage.

Both the lower Courts have held that s. 62 of the Indian Contract Act, 1872, applies, and that the prior mortgage has become extinguished, and the plaintiff's suit has accordingly been dismissed.

I am unable to agree in the conclusion which they have arrived at. It depends upon the intention of the parties whether or not the earlier security has become merged or extinguished in the latter one, and I think that the nature of the transaction and the acts of the parties, as well as the documents themselves, show that, in the present case, there is no such intention. There is nothing in the mortgage bond of 1278 which indicates that the plaintiff meant to forego the benefit of the security created by the mortgage bond of 1271. On the other hand, it refers to that previous mortgage as a then subsisting security. The bond of 1271 was not cancelled or returned to defendants No. 1, but has continued all along in the possession of the plaintiff, and has in point of fact been filed by him with his plaint. It is very improbable that the plaintiff, when adjusting the account of what was due upon the foot of the mortgage in 1278, and finding a large sum to be due for arrears of interest, and taking in consequence another mortgage of the same lands together with others, should relinquish, or intend to relinquish, his original and earlier security.

It is argued, however, that the property mortgaged is not the same, and therefore that a substitution of securities must have been intended, and a consequent extinguishment of the prior mortgage has taken place.

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I think this argument is founded upon a misapprehension of the real nature of the transaction.

The mortgage bond of 1271 gives the plaintiff the security of 20 bighas of land, namely, 10 out of 50 bighas in one village (which is a native expression for one-fifth of the land in that village) and 10 bighas situated in another village. The mortgage bond of 1278, which is made when the debt had become increased by large arrears of interest, extends the plaintiff's security to 30 bighas of land,—namely, 20 out of 50 bighas in the first village (which is equivalent to two-fifths of the lands in that village) and the same 10 bighas out of the second village. That the 10 bighas in Dowlutpore, the second village, are the same lands already mortgaged by the first bond there can be no doubt, and as to the two-fifths of the land in Kuchia, the first village, that must be taken to mean, in the absence of all evidence to the contrary, the one-fifth already mortgaged by the first bond and an additional one-fifth of the land in the village; this latter one-fifth being mortgaged to the plaintiff for the first time by the bond of 1278.

The transaction which took place between the plaintiff and the defendants No. 1 in 1278 was not intended to be, nor in point of fact was, a substitution of the later mortgage for the earlier one, but a giving of further security in consequence of the original debt having become increased by large arrears of unpaid interest, and therefore no merger or extinguishment of the previous mortgage in the later one has occurred. The circumstance that the original debt was in the mortgage bond of 1278 augmented by the addition to it of the arrears of interest, and that the interest upon the aggregate debt was reduced appears to me to make no difference on this question, which is one of merger of securities.

In *Temson* v. *Sweeny* (1), where the same question arose, Sir Edward Sugden, afterwards Lord St. Leonards, made the following remarks:—"Then another point was started that, as the successive mortgages were for the sums secured by the former mortgages and for the sums subsequently advanced, the old securities were merged in the new, and that the judgment-

(1) 1 Jo and Lat., 717

creditor had a right to come in before the last mortgage. That is a very novel view of the operation of the deeds. I have had considerable experience in this particular department of the law, and I never before heard of such a doctrine. It is clear that the former mortgages continued untouched and operative, notwithstanding the new mortgages, and the new mortgages were for the purpose of letting in the further advances upon the property. Nothing could be more alarming to creditors than that a doubt should be thrown out whether, by taking a new security for their old debt and for further advances, they do not prejudice their original securities." See also *Miln* v. *Walter* (1).

As the original mortgage is, in my opinion, not extinguished, and the defendant acquired the 60 bighas of land subject to that mortgage, the appeal should be allowed with costs, and the following decree substituted for the one made by the first Court, that is to say, declare 10 bighas out of 50 bighas, or one-fifth of the lands in Mouzah Kuchia, in the possession of the defendant No. 2, and 10 bighas of the lands of Mouzah Dowlutpore, also in the possession of defendant No. 2, are well charged with the payment to the plaintiff of the amount due upon the mortgage bond of 13th Srawun 1271 F.S., and also with the costs of this suit.

Let the amount due upon that mortgage bond for principal and interest down to three months from this date, after deducting any payments on account of interest made thereon, be ascertained.

On payment by defendant No. 2 to plaintiff of such amount and costs, let the above lands be held by defendant No. 2 discharged from plaintiff's mortgage of 1271.

On failure by defendant No. 2 to pay to plaintiff the amount so found due within three months from the date, let the lands hereby declared to be charged be sold and the net proceeds of sale applied in and towards satisfaction of the amount so found due to the plaintiff, together with the costs of the suit; and if any balance remains due to the plaintiff after the net proceeds of sale shall have been so applied; let the same be paid to plaintiff by defendants No. 1, who are the plaintiff's mortgagors.

Appeal allowed.

(1) 2 Y. and C. Ch., 354 and 361, before Vice-Chancellor Knight Bruce.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

1878 *Jany.* 11.

GOLAP CHAND MARWAREE (PLAINTIFF) *v.* THAKURANI MOHOKOOM KOOAREE AND ANOTHER (DEFENDANTS).*

Promissory Note—Unstamped Document—Admissibility of Evidence aliunde.

The plaintiff, in a suit on a promissory note written on unstamped paper, is not debarred from giving independent evidence of consideration.

Ankur Chunder Roy Chowdhry v. *Madhub Chunder Ghose* (1) distinguished.

THIS was a suit by the endorsee of a promissory note to recover upon the note the sum of Rs. 1,878 and 7 annas. The note was unstamped, and was thereupon declared inadmissible as evidence. The Court at the same time refused to permit the plaintiff to prove consideration by other evidence. The lower Appellate Court upheld this decision, and the plaintiff preferred a special appeal to the High Court.

Baboo *Mohesh Chunder Chowdhry* for the appellant.

Baboo *Taruck Nath Sen* for the respondents.

The judgment of the Court was delivered by

KENNEDY, J.—The general principle seems well settled that the existence of an unstamped promissory note does not prevent the lender of money from recovering on the original consideration, if the pleadings are properly framed for that purpose: *Farr* v. *Price* (2). In this country, the great power given of raising the true issues between the parties prevents the question of pleading having much importance. Our only difficulty arose from the decision of Sir R. Couch in *Ankur Chunder Roy Chowdhry v. Madhub Chunder Ghose* (1).

* Special Appeal, No. 2839 of 1876, against the decree of J. M. Lowis, Esq., Judge of Zilla Bhagalpore, dated the 13th of September 1876, affirming the decree of Baboo Mothoora Nath Goopta, Subordinate Judge of that district, dated the 22nd of June 1876.

(1) 21 W. R., 1. (2) 1 East, 55.

When that case, however, is examined, it does not support the proposition for which it was cited by the respondents' pleader. It is not very satisfactorily reported, there being no note of the argument or statement of the facts; but so far as we can gather, there had been no attempt in the lower Court to give independent evidence of the consideration, the contention for the plaintiff being that there was a sufficent admission of the note in the written statement; and I think it highly improbable that, considering the Judges who decided the case, they intended, without any allusion to *Farr* v. *Price*, to overrule Lord Kenyon's decision in that case, which precisely governs the present appeal, in which it appears that the plaintiff did seek to give evidence of the advance, the form of pleading being as I said not material.

Appeal allowed.

PRIVY COUNCIL.

BANNOO AND OTHERS (DEFENDANTS) v. KASHEE RAM (PLAINTIFF).

P. C.*
1877
Dec. 6, 7.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu Law—Joint Family—Joint Estate—Presumption.

In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that everything in the possession of any one member of the family belongs to the common stock The onus of establishing the contrary rests on him who alleges separate property

But this presumption does not arise where it appears that there has been a division of the family property, and a separation in the family, all the members of which are living separately.

THIS was an appeal from a judgment of the Judicial Commissioner of Oudh, dated the 26th February 1875, confirming decisions pronounced by subordinate Courts in Oudh, in favour of the respondent, who was the plaintiff in the suit.

The only question arising on this appeal was as to whether the plaintiff had established his claim to succeed to certain

* *Present:*—SIR J. W COLVILE, SIR B. PEACOCK, SIR M. E SMITH, and SIR R. P. COLLIER.

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property which had been held by his deceased uncle, by reason that, at the time of his uncle's death, he and the plaintiff were members of a joint undivided family, and that the property in question was joint-family property.

Mr. *S. G. Grady* and Mr. *C. W. Arathoon* appeared for the appellants.

The respondent was not represented.

Their Lordships' judgment, reversing the judgments of the Court below, was delivered by—

SIR M. E. SMITH.—This is a suit brought in the Court of the Civil Judge of Lucknow, by Kashee Ram, a nephew of Ram Dyal, who died in the year 1873, against Mussamut Bannoo and Mussamut Munna, the widows of Ram Dyal, and Munna, Lall, his grandson, the son of his daughter. The claim is for an eight-anna share, or one-half, of all the property in possession of Ram Dyal at the time of his death. The property consists principally of moveable property, but the claim includes a pucca house and shop.

The claim is based on the foundation that Ram Dyal, at the time of his death, was a member of a joint family, consisting of himself and of the plaintiff Kashee Ram and his brother Kasho Ram,—those two being the sons of Ram Buksh, a brother of Ram Dyal. Kasho Ram did not join in this suit. The state of the family was this: Ram Gholam left four sons—Sheo Buksh, Ram Bilas, Ram Buksh, and Ram Dyal. Sheo Buksh and Ram Bilas are dead; one dying without a widow or children, and the other leaving a widow only. Ram Buksh had two sons, Kashee Ram, the plaintiff, and Kasho Ram. Ram Dyal had no son. The plaintiff admits in his plaint that his grandfather Ram Gholam divided the ancestral property amongst his four sons, though, according to his statement, the four sons did not take separately, but Sheo Buksh and Ram Bilas took one-half jointly, and so formed a separate family, and the other half was allotted to Ram Buksh and Ram Dyal. He contends that Ram Buksh and Ram Dyal remained a joint family. On the part of the present appellants, the defendants, it is stated,

that the division by Ram Gholam was not into two parts, as Kashee Ram contends, but that each of the sons took a separate share.

There is no distinct proof, one way or the other, as to the nature of that division, but undoubtedly a division was made, and it may be taken as against the plaintiff that at all events the family was divided into two groups at that time. It further appears that, in the lifetime of Ram Dyal, Kashee Ram, the plaintiff, and his brother Kasho Ram, as between themselves, separated, and therefore the family was still further broken up. It also appears that, whatever the division of the property may have been by Ram Gholam, all the members of the family lived separately, and there was no commensality between them. In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that that presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore, as he seeks to recover property which was in the possession of Ram Dyal and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property to which he and his brother Kasho Ram, as surviving members, were entitled. It may be stated that the issue in the case, which is the only one material to be decided, raises distinctly that question. The issue is, "Was the plaintiff joint with Ram Dyal at his death?" The evidence is extremely scanty, and what there is of it is very unsatisfactory. That remark was made by the Commissioner upon the appeal from the Civil Judge, and was also made by the Judicial Commissioner when the question came before him on the right of appeal

(Their Lordships, after analysing the evidence relied on by the plaintiff, and commenting on the judgments of the lower Courts, concluded by advising Her Majesty to reverse these

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judgments and to dismiss the plaintiff's suit with costs in the Courts below, and they allowed the appellant the costs of the appeal.)

Appeal allowed.

Agent for the appellants: Mr. *T. L Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Kennedy.

1877 *Dec.* 21

CHUTTERDHAREE LALL (DECREE-HOLDER) *v.* RAMBELASHEE KOER AND OTHERS (JUDGMENT-DEBTORS).*

Security Bond—Surety—Execution—Act VIII of 1859, *ss.* 204, 342.

A bond given as security for costs under s. 342 of Act VIII of 1859 may be enforced in a summary way by proceedings in execution.

Ram Kishen Doss v. *Hurkhoo Singh* (1) and *Gujendro Narain Roy* v *Hemanginee Dossee* (2) distinguished.

IN this case, Chutterdharee Lall, the present appellant, had obtained a decree against one Mohabir Persaud and another, in the Court of the Subordinate Judge of Tirhoot. An appeal was filed against this decree in the High Court. Before the hearing of the appeal, the then appellants were called upon, under s. 342 of Act VIII of 1859, to furnish security for costs of the appeal. One Brojo Coomar Singh stood surety for these costs, and signed a security bond to that effect. The appeal was thereupon heard and dismissed. Brojo Coomar Singh having in the meantime died, Chutterdharee Lall applied for execution of his decree for costs against his representatives. The Subordinate Judge refused such application, on the ground that the High Court had not specifically named the surety Brojo Coomar Singh in its final decree. Chutterdharee Lall appealed to the High Court.

* Miscellaneous Regular Appeal, No. 218 of 1877, against the order of Baboo Grish Chunder Ghose, First Subordinate Judge of Zilla Tirhoot, dated the 24th of March 1877

(1) 7 W. R., 329. (2) 13 W. R., 35.

Baboo *Rajendro Nath Bose* for the appellant.

The respondents were unrepresented.

The judgment of the Court was delivered by

AINSLIE, J.—It appears to us that this case is clearly distinguishable from the cases of *Ram Kishen Doss* v. *Hurkhoo Singh* (1) and *Gujendro Narain Roy* v. *Hemangnee Dassee* (2), in which it was held that s. 204 does not apply to parties who have become sureties after the decree. In the present case the security was demanded and taken under s 342 before the decree, for the purpose of securing to the respondent his costs in the event of his being successful.

The case must, therefore, go back to the Subordinate Judge in order that he may allow execution to proceed against the sureties; but before doing so, it will of course be necessary that the decree-holder should give the surety notice of his intention to proceed against him instead of proceeding against the original judgment-debtor; he should be served with notice to show cause why the decree should not be executed against him.

We may also observe that in this case the original surety appears to be dead. It will, therefore, also be necessary, unless it has already been done in an earlier stage of the proceedings, to issue a notice under s. 216 before any steps are taken for enforcing the decree against the respondents.

Appeal allowed.

(1) 7 W R, 329. (2) 13 W. R., 35.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

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Jany 9

THE EMPRESS *v.* THACOOR DYAL SING AND ANOTHER.*

Criminal Procedure Code (Act X of 1872), s. 530—Constructive Possession—Intermediate holders.

In a case of disputed possession between two rival zemindars, constructive possession through intermediate holders (*ticcadars*), to whom the ryots pay rents, is not such possession as is contemplated by s. 530 of the Code of Criminal Procedure.

THE reference to the High Court arose out of the following circumstances:—Disputes arose between one Sidhu Singh and Kasa Singh on the one side, and Dirgopal Singh and Thacoor Singh on the other, concerning their respective shares as rival zemindars to certain villages. Each party was, under s. 491 of the Criminal Procedure Code, bound down by the Deputy Magistrate of the subdivision to keep the peace for six months. Sidhu Singh and Kasa Singh appealed to the Magistrate of the district, who, while upholding the order of the Deputy Magistrate, suggested that the case seemed one of disputed possession, and might therefore be dealt with under s. 530 of the Code of Criminal Procedure. The Deputy Magistrate thereupon commenced proceedings under this section against the parties. A proportion of the villages comprising the lands in dispute were admittedly not held directly by the zemindars, but through *ticca* or intermediate holders to whom the ryots paid their rents. The Deputy Magistrate decided against the claim of Dirgopal Singh and Thacoor Dyal, and they appealed to the Magistrate of the district, who referred the matter to the High Court.

Baboo *Gopal Lall Mitter* and Baboo *Anund Gopal Paulit* for the appellants.

* Criminal Reference No. 2790 of 1877, from the order of W. S. Wells, Esq., Magistrate of Shahabad, dated the 13th December 1877.

The judgment of the Court was delivered by

AINSLIE, J.—(who, after disposing of the case on grounds immaterial to this report, proceeded as follows).—Independently of this there is another reason for which the order must be set aside. In the order of the Magistrate by which he referred the case to the Deputy Magistrate for explanation, it is said that the petitioner before him had asserted that six and twenty villages out of the thirty which formed the subject of the order were actually held in *ticca*. The Deputy Magistrate in his reply does not deny that there are certain villages in the possession of *ticca-dars*, but he contends that there being a dispute between the contending parties as to collection of rent, at is necessary to decide the question of possession in respect of all the villages held in *khas* and *ticca* jointly, by which he apparently means all the villages, whether held *khas* or leased out. No doubt it has been held that questions between zemindars as to the right of collecting rents directly from the ryots may be considered by Magistrates, and that this right of so collecting rents is in fact possession within the meaning of s. 530; but that does not apply when there is an intermediate holder who admittedly receives rents from the ryots. Therefore, the order of the Deputy Magistrate is clearly bad as to all the villages which are not held direct by one or other of the zemindars, but are in the possession of farmers. Whether they be six-and-twenty in number or less is immaterial. It does not appear on this record which villages are held in farm and which are not. Therefore, we are unable to set aside any specific portion of the order of the Deputy Magistrate.

The only question before us is, whether we ought to quash his proceeding altogether or direct a further enquiry. We think, on the whole, that it is unnecesary that any further enquiry should be held on the present proceedings. They originated in a suggestion of the Magistrate of the district, and it appears that the sub-divisional officer would not but for that, have taken any proceedings under s. 530. He was satisfied with the steps that he had taken, in binding down both parties in recognizances to keep the peace. It is still open to him if he thinks fit to make an enqniry,

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and he is satisfied that unless proceedings be taken under s. 530, breach of the peace is imminent, he can institute proceedings afresh; but if he should deem it proper to record any fresh proceeding under s. 530, it will be necessary for him to ascertain clearly and define the particular villages or portions of villages to which the enquiry is to apply, excluding all those which are not in the immediate possession of either one party or the other.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice—McDonell.

1877 *Nov.* 28.

GUNGAPERSAD AND OTHERS (PLAINTIFFS) *v.* GOGUN SING (DEFENDANT).*

Registration—Dowl Fehrist—Act VIII of 1871.

A *dowl fehrist* being merely a memorandum by a zemindar's agent of the rates of rent agreed upon, and to which the tenants affix their signatures in token of such agreement, is not a contract, and does not require to be stamped or registered.

THIS was a suit for arrears of rent at a certain rate admittedly in excess of the rent previously paid by the defendant. In proof of his claim for the excess rate, the plaintiff filed a *dowl fehrist*, purporting to be a memorandum containing a list of the holdings and rates of rents of the ryots with their signatures appended. The plaintiff obtained a decree in the Munsif's Court. The lower Appellate Court, however, reversed the finding of the Munsif on the ground that the *dowl fehrist* which formed the base of the plaintiff's claim was not registered, and therefore not receivable in evidence.

The plaintiff preferred a special appeal to the High Court.

Baboo *Unnoda Pershad Banerjee* and Baboo *Neelmadhub Sen* for the appellants.

* Special Appeal No. 2545 of 1876, against the decree of J. R. Hallett, Esq., Second Subordinate Judge of Bhagulpore, dated the 11th August 1876, reversing a decree of Moulvi Syed Khajeh Fukhruddin Hossain, Munsif of Monghyr, dated 25th February 1876.

Baboo *Kalee Kissen Sen* for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—The question that arises in this special appeal is whether the lower Appellate Court is right in reversing the decree of the Court below, and apparently dismissing the suit on the ground of the reception of a document called *dowl fehrist*, which, in the opinion of the lower Appellate Court, was inadmissible, because it was not registered and not stamped. It is not discoverable from the judgment of the Munsif that any objection had been taken to the *dowl* in the Court of first instance on that ground. The contest before him appears to have been whether the *dowl* was genuine or not,—that is to say, whether it recorded facts which were actually true. But the Judge holds that it was "nothing more or less than the record of the new rates of rent, and that the signatures of the ryots were taken to it in testimony of their agreement to cultivate the lands at the rate mentioned. It specified seven years as the period for which these holdings were to continue, and should therefore have been registered." Now it seems that the plaintiff when he filed his plaint filed not only the jumma-wasil-bakees relating to the years in dispute, but at a later stage of the case a document was also filed, which, as Mr. Hallett says, "it pleased the plaintiff to call a *dowl fehrist*." Mr. Hallett does not say why the plaintiff should not have been pleased to call it a *dowl fehrist*, nor does he suggest any other appropriate name by which it ought to be called. But the use of it is to be found in the judgment of the Munsif. He says:—"From the testimony of the plaintiff's witnesses, who are trustworthy persons and proprietors of the mouza, as well as from that of the patwari, the writer of the *dowl*, it is fully proved that the *dowl* was prepared correctly and faithfully, and that it was accepted by all the tenants," and there was evidence which the Munsif accepted to show that rent had been collected from the ryots afterwards in accordance with that *dowl*. Therefore we understand the *dowl* was merely a memorandum or record by the zamindar's agents of the rent which had been settled between the zamindar and the ryots,

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and that the various ryots affixed their signatures to this *dowl* in testimony of their admission of the correctness of the jumma thereon recited as having been imposed on them. The *dowl* was not in itself a contract. It was no more a contract than are chittas or measurement papers, or what are called *suruthalic* papers, which are constantly signed by ryots, monduls, and other persons in tesimony of their concurrence. It appears to us that there is nothing in the law to require a *dowl fehrist* to be either registered or stampted, nor, on the other hand, is it a document which could be regarded as binding or conclusive evidence of a contract. It is a matter of observation of course, and throws the burthen of explanation upon any ryot who, having put his signature to it, afterwards disputes the facts which it recites. It may fairly be asked how came you to sign this document if you were not a consenting party to it. It seems to us, therefore, that the Judge was wrong in saying that this document was inadmissible, and that he ought to have taken it into consideration together with the other evidence. The case will be remanded to the lower Appellate Court accordingly.

Case remanded.

PRIVY COUNCIL.

P. C.*
1877
June 27, 28.

ASHGAR ALI AND OTHERS (PLAINTIFFS) *v.* DELROOS BANOO BEGUM (DEFENDANT).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Purdah Woman—Execution of Documents.

A Court, when dealing with the disposition of her property by a *purdah* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing, especially in a case where, without legal assistance, for no consideration, and without any equivalent she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a purdahnashin woman, who has no legal assistance, the ordinary presumption that if a person of competent capacity signs a deed he understands the instrument to which he has affixed his name, does not arise.

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

The decision of the High Court that the endowment created by the document was not of such a public character as would sustain a suit under Act XX of 1863, not dissented from.

THIS was an appeal from a decision of a Division Bench of the Calcutta High Court, dated the 20th April 1875, reversing a decision of the Judge of the 24-Pergannas, dated the 21st March 1874, and dismissing the suit instituted by the appellants in the latter Court.

The facts of the case and the questions therein raised for determination are set forth in the report of the case in the Court below (1).

At the hearing of the appeal Mr. *Leith*, Q. C., and Mr. *Doyne* appeared for the appellants, and Mr. *Cowie*, Q. C., and Mr. *J. D. Mayne* for the respondent.

Their Lordships' judgment, affirming the decision of the High Court, was delivered by

SIR M. E. SMITH.—This suit was instituted under Act XX of 1863, against the respondent, as the *mutawalli* of a Mahomedan religious endowment, for malversation in wasting and misappropriating the estate. The plaintiffs (appellants) sought to obtain an account, the removal of the respondent from the office of *mutawalli*, and the appointment of two of the plaintiffs, who are her nephews and next heirs, in her place. The allegation in the plaint, which is the foundation of the plaintiffs' case, is as follows: "That the defendant has, by a registered *waqfnamah* of the 25th Zikad 1268, Hijri," answering to the 10th September 1852, "endowed the entire estate held and owned by her to the Imambara for religious purposes." The Judge of the Court of the 24-Pergannas made a decree in favour of the plaintiffs, establishing the validity of the endowment, and granting the relief prayed. This decree was reversed by the High Court, on the ground that the allegation in the plaint, which has just been cited, was not established. It was also held that the endowment, if established, was not of such a public nature as would sustain a suit under Act XX of 1863.

(1) 15 B. L. R., 167.

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ASHGAR ALI v. DELROOS BANOO BEGUM.

The respondent inherited a large estate from her mother, Nigarara Begum, having survived two brothers, who died in their mother's lifetime. Two of the plaintiffs are the sons of one of these brothers; the other three plaintiffs are persons in no way connected with the family, but who claim the benefit of the endowment. The mother, Nigarara, died in 1850; and about two years afterwards the *tauliutnamah* relied on was executed. The family are Mahomedans of the Sheah sect. The *tauliutnamah* is dated the 10th September 1852, and the material parts of it are these: "I make a trustworthy declaration and "a legal acknowledgment, and give in writing to the effect that "I consider it indispensable and incumbent upon me to continue "and perpetuate the ceremonies for pious uses of such descrip-"tion as '*fatiha*' (offering prayers for the dead), '*hazrat*,' on "whom be the benedictions, &c., which is the fixed and settled "usage of my family. I have no lawful children or grand-"children who may be my legal heirs, therefore *talooka* of Chit-"pore," describing certain property, "and all the compensation "money, &c., the price of which at present is estimated at one "lakh of Rs. (1,00,000) which I hold in my possession, without "any one having any share therein, and without there being any "other co-partner, as my legal hereditary right, having received "the same from my ancestors in accordance with what is laid down "in separate documents, the same for special pious purposes I "have made *waqf* in perpetuity, with all inherent adventitious "rights and interests, large and small, lying therein attached "thereto, and arising therefrom, with all appurtenances particu-"larly of pious uses. As long as I live, the wife of my brother "of blessed memory, Mussummat Jigri Khanum, the daughter "of the late Moonshi Hidayat Ali, shall remain *mutawalli* of "the afore-mentioned *waqf*. If I, the endower, die before the "aforesaid lady, then the affairs connected with *tauliut* shall, in "a perfect form, revert to the afore-mentioned lady. Should the "afore-mentioned lady die before me, I, the bequeather, alone "will act as a *mutawalli* of the *waqf* endowed property. The "one of us two who may survive the other shall, either at the "time of death or previous to it, appoint whomsoever she finds "most worthy and befitting as a trustee (*mutawalli*) to the en-"dowment." Then the deed goes on, "The specification of the

"expenses is this: All the income derived from the afore-mentioned endowment has, after the payment of the Government revenue, been divided into 28 parts. Of these, 15 parts are to be applied to the expenses of the *fatiha* of the Lord of the Universe, the last of the prophets (Mahomed) and the Imams, the blessing and peace of God be with them all, and the expenses of the ten days of Mohurrum and all the holy days, the repairs of Imambari and tombs; seven parts thereof shall be received by all the *amlahs* and servants, whose names are inserted at the foot of this or other documents bearing the seal and signature of me, the declarant, which they may have in their possession, some from generation to generation, and others as long as they retain the service, as detailed in separate documents; and six parts thereof will be received by us, the *mutawallis*, in equal shares." Now, the effect of this instrument is to devote all the property which this lady possessed to religious uses, to destroy her rights as proprietor, and to constitute her one only of the *mutawallis* for the management of the endowment, giving her three-twenty-eighths parts of the income of the whole property only for her management. The deed was written in Persian, a language the Begum did not understand. Her case is, that although she executed the instrument, its contents were not explained to her, and that she was ignorant that its effect would be that which has just been described.

Their Lordships are of opinion, agreeing with the High Court, that it is not established that the Begum understood the full import and effect of the document she executed. It is incumbent on the Court, when dealing with the disposition of her property by a *purdahnashin* woman, to be satisfied that the transaction was explained to her, and that she knew what she was doing; and especially so in a case like the present, where, for no consideration, and without any equivalent, this lady has executed a document which deprives her of all her property.

A mutation of names from her own alone, to her own and Jigri Khanum's as *mutawallis* was effected; but the *mooktearnamah* was not proved. Undoubtedly, also, the estates were afterwards described in several documents as *waqf mehals*, and she herself was described in many transactions relating to the

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estates as mutawali. Receipts for rents were given first in her own and Jigri's name as *mutawallis*, and, after Jigri's death, which happened about two years after the deed, in her own name as *mutawalli*. *Pottahs* were granted in which she is so described. Suits were also brought in which she is plaintiff with a similar description. On the other hand, for more than twenty years, notwithstanding she was nominally described in the transactions to which I have referred as *mutawalli*, she actually dealt with the property as her own. She granted *mourusi* leases, sold parts, and mortgaged other parts, and in every way treated the property as her own, and as if it were not subject to a religious trust. Those acts, which extended over the whole time from the execution of the deed to the commencement of the suit, are very strong to show her own consciousness, that while she was described as *mutawalli* she really believed herself to be the proprietor and owner of the property, and had no idea that she had reduced herself to the state of a mere manager of it, entitled only to three-twenty-eighths parts of the income for her maintenance.

Her own evidence, with reference to the deed, is given in an apparently candid manner. She admits its execution, and that she intended to create some trust for religious purposes; but she denies that she knew what was the full extent and import of the deed. She says: "I executed the *tauliutnamah* when I was "residing in this house. I have been, prior to the execution of "the *tauliutnamah*, residing and am still residing in this house, "since my mother's death. When my mother died I was then "at Moorshedabad. A year after my mother's death I came "here, but on the way my nephews Nawab Ashgar Ali and "Nawab Ahmed Ali, the plaintiffs in this suit, stopped my "boat. I was detained for twenty days near Roushenabad, and "then I applied to the Magistrate and got my boat released. "After this I came here. Two or three years after I came "here, I executed this *tauliutnamah*. I myself do not know how "to read and write. I told Ali Zamir, my servant, to draw out "a will, or some such writing, as will after my death be able to "keep up the religious ceremonies of my mother. Then he "brought to me a writing which he read to me." She says in

another place that it was read in Persian: "He also told me "that after my death, whoever will be the *mutawalli* will perpe- "tuate the works (*i.e.*, the religious affairs) of my mother. I "do not understand Persian." Then there is a note by the Commissioner. "A portion of the document marked 'A' was "read to the witness, and she says, I do not understand it. "That portion being translated into Urdu by Abdool Aziz, she "says: I now understand it. My object in making the *tauliut-* "*namah* was not what is stated in the part marked A." This part of the deed is not identified, but no doubt it was a material part. Then there is this question, "Whether for the purpose "of perpetuating the ceremonies observed in your family from "ancient time, you executed the *tauliutnamah?* Answer, "Moonshi Ali Zamen brought to me a writing saying that I "shall have absolute power over the properties during my life- "time." If the deed was thus represented to her, then it did not carry out her intentions. It was a deed which not only did not carry them into effect, but was entirely and absolutely opposed to them. She intended and desired to retain the estate for her own life, and to create an endowment by way of testamentary disposition of it after her death. The person who prepared the *tauliutnamah* may have been aware that she could not effect her purpose by such a disposition, and having prepared this deed may have led her to suppose that it did carry out her purpose, without explaining to her that it would deprive her of her property and leave her in the state of a mere manager of it, liable to be deprived of that management if she broke any of the trusts of the deed. It is impossible to suppose that she could have been conscious of the tenor and effect of the deed, when immediately after, and ever after, she wholly disregarded the trusts of it by the mode in which she dealt with the property.

There are eight witnesses to the deed; one only has been called, and he does not prove that the deed was read over and explained. This witness does not say that he was present when it was read over to her in Persian. Undoubtedly, if a person of competent capacity signs a deed, it is to be presumed that he understood the instrument to which he has affixed his name;

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but in the case of a *purdahnashin* woman, who had, as in this case, no legal assistance, the ordinary presumption does not arise; and it is incumbent upon the Court to be satisfied, as a matter of fact, that she really did understand the instrument to which she has put her name. This seems to have been the view of the High Court, which it has expressed in two passages of the judgment. The Court says: "It is clear that she had no "professional assistance at the time. Ali Zamen is described "as an old and trustworthy servant, but not a lawyer,"—(it may be observed, the respondent says, that this is the only deed that he ever drew as far as she knows,)—"and none of the "witnesses examined for the plaintiffs prove that the Beguml "in creating the *waqf* was in any way cognizant of the effect "of her act. It has been generally held in this country that "*purdahnashin* ladies have a claim to special consideration, "particularly in cases where they deny on oath an effectual "knowledge of documents which they are said to have made." And, again, the Court says: "In this case we have an illiterate "and prejudiced woman, with no professional assistance, exe-"cuting a deed written in a language which she did not under-"stand, and which, as she swears, was not explained to her, by "which she completely divests herself of the whole of a large "property, and then immediately sets to work to do a series "of acts which would have the effect of turning her out of the "*mutawaliship* she had created for herself, and of throwing her "upon the world absolutely penniless. Before we come to such "a conclusion we ought to have very distinct proof that the "real purport of the *waqf* deed was properly explained to "Dilrus Banoo Begum, and that she knew what she was about, "and that it is not too much to say that no such proof has been "attempted to be given by the plaintiffs."

Their Lordships having come to this conclusion upon the main facts of the case, it is not necessary for them to determine the other point which the High Court decided,—namely, that this endowment was not of such a public character as would sustain a suit under Act XX of 1863, but their Lordships desire to say that they see no reason for disagreeing with that part of the judgment.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

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Appeal dismissed.

Agent for the appellants: Mr. *T. L. Wilson.*

Agents for the respondent: Messrs. *Wrentmore* and *Swinhoe.*

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

KRISHNA MOHUN BOSE (DEFENDANT) *v.* OKHILMONI DOSSEE (PLAINTIFF).*

1877 *Dec.* 8.

Maintenance, Suit for—Limitation—Act XIV of 1859, *s.* 1, *cl.* 13—*Act IX of* 1871, *sch. II, art.* 128.

A claim once barred cannot be revived by a change in the law of limitation. This principle applies as well to a claim for arrears of maintenance or any other claims as to one for possession of land.

THIS suit was instituted by the widow of one Gocul Chunder Bose, against her late husband's brother, for maintenance. Gocul Chunder Bose died in Magh 1251 B.S. (1845), and the lower Court found that the plaintiff had neither received nor made any claim for maintenance from that date till the year 1278 B.S. (1871). The present suit was filed on the 17th September 1873. The Court of first instance gave the plaintiff a decree, finding that, under Act IX of 1871, the law of limitation in force at the time of filing the plaint, the claim was not barred. The lower Appellate Court upheld this decision, and the defendant preferred a special appeal to the High Court.

Baboo *Chunder Madhab Ghose* and Baboo *Bhoirab Chunder Banerjee* for the appellant.—The suit is barred by limitation.

* Special Appeal, No. 228 of 1876, against the decree of W. Macpherson, Esq., Officiating Judge of Zilla Cuttack, dated the 9th September 1875, affirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 24th September 1874.

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The lower Court having found that no payments had been made to the plaintiff, she should, under Act XIV of 1859, the law of limitation then in force, have brought her suit within twelve years of her husband's death. Having failed to do so, her right is extinct, and cannot be revived by any change in the limitation law. Act IX of 1871, therefore, does not apply to this case. When a suit for the recovery of land is barred by Statute of Limitation, the right is extinct: *Gunga Gobind Mundul* v. *The Collector of 24-Pergunnahs* (1); see also *Thakoor Kapil Nath Sahai Deo* v. *Government* (2) and *Nocoor Chunder Bose* v. *Kally Coomar Ghose* (3).

Baboo *Radhika Churn Mitter* for the respondent.—The law of limitation applicable is that in force when the plaint was filed. A debt is not necessarily extinguished although barred by limitation. See s. 60 of the Contract Act, which permits a creditor to appropriate money of his debtor to a barred debt.

The following judgments were delivered:

MARKBY, J.—In this case plaintiff sues to recover Rs. 1,750 on account of arrears of maintenance at Rs. 50 a month. The person whom she sues is her husband's brother. It has been found that the father of the plaintiff's husband, and of the defendant, died, leaving certain property, which had descended to him from his father; and the first Court held that the plaintiff was entitled to an allowance of Rs. 16 a month out of this property, and gave her a decree for Rs. 560. This decree was appealed against, but the appeal was dismissed. The defendant has now brought the case here on special appeal.

Before us it is not denied that the plaintiff, upon the death of her father-in-law, became entitled to maintenance out of the ancestral estate, but it is contended that, under the circumstances of this case, that right was extinguished by the operation of the law of limitation as interpreted in India. It is conceded that, having regard to the peculiar words of art. 128, Sched. II of Act IX of 1871, that Act, which was

(1) 11 Moore's I. A., 345 S. C., 7 W. R., P. C., 12.

(2) 13 B L. R., 445, at p. 460.

(3) I. L R., 1 Calc., 328.

in force when this suit was brought, creates no bar to the maintenance of this suit; but it is contended that, under the provisions of the prior Statute, Act XIV of 1859, this claim for maintenance was extinct prior to the passing of Act IX of 1871, and that a claim which has once become extinct cannot be revived by a change in the law of limitation.

I think this contention is well founded. The facts are these: the plaintiff's father died in 1845, and from that time at any rate the plaintiff has lived apart from her husband's family, receiving nothing from them, and making no claim upon them. By cl. 13 of s. 1 of Act XIV of 1859, the period of limitation for suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate, is twelve years from the death of the person on whose estate the maintenance is alleged to be a charge, or from the date of the last payment to the plaintiff by the party in possession of the estate on account of such maintenance. Under that Statute, therefore, the plaintiff's right to bring a suit for maintenance was certainly barred in 1868. But the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (1) establishes upon a firm basis the principle that where a suit for the recovery of possession of land is barred by a Statute of Limitation, the right is extinct: and to this extent the Statutes of Limitation in India ceased to be merely Statutes which regulate the practice of the forum, and become Statutes affecting the right. In fact, they become to this extent Statutes of prescription.

Then, is there anything peculiar in the case of a suit to recover the possession of land upon which any distinction can be based, and upon which it can be argued that whilst in this case the right is extinct where the remedy is barred, it is, nevertheless, not so in other cases. There has generally been more reluctance to apply rules of prescription to titles to land than to any other cases; and if the right to land is extinguished by a neglect to pursue the remedy, I should be disposed to say that *á fortiori* other rights are extingulished also. This seems to have been the view taken in this Court in two recent decisions. Thus Act XXV of 1857 provides that

(1) 11 Moore's I. A., 345, S. C., 7 W. R., P. C. 12.

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no suit or other proceeding for the recovery of property seized under that Act shall be had or taken unless the same be instituted within one year of the seizure. That section was repealed by Act IX of 1871. But the Court (Sir Richard Couch, C J., and Birch, J) said, "the right to bring a suit was extinguished and it was not revived by the repeal of the Act" (1). So in a case before Mr Justice Pontifex—*Nocoor Chunder Bose* v. *Kally Coomar Ghose* (2) —the plaintiff sued on a promissory note payable on demand. Under Act IX of 1871, which was in force when the suit was brought, the suit would not have been barred ; but under Act XIV of 1859 the suit was already barred on the 1st of April 1873, when Act IX of 1871 came into operation. Pontifex, J., said,—"It is impossible for me to hold that plaintiff is not barred now because he has deferred the institution of his suit until after the 1st day of April 1873." The learned Judge must, therefore, have thought that the debt was extinguished by the operation of the previous Statute.

It has been pointed out to me that s. 60 of the Contract Act appears to proceed upon the principle that a debt barred by limitation is not extinguished, because that section allows a creditor to appropriate the money of his debtor to a barred debt. This provision might certainly appear at first sight somewhat in contradiction with Mr. Justice Pontifex's judgment, but I should not be inclined upon the strength of this provision to dispute the propriety of that decision. I would rather treat this provision of the Contract Act as anomalous, and in conflict with the general principles of Indian law. It seems to me that in this country it is essentially necessary to take this view when the policy of the Legislature in matters of limitation has been so unsettled. There have been three Statutes of Limitation in less than twenty years, each laying down rules differing considerably from those of its predecessor. It would create great confusion if every time a new Act of Limitation were passed, rights which were supposed to be barred were again revived : and the great advantage of a law of limitation, that it enables men to reckon upon security from further

(1) 13 B. L. R , 445, at p 460. (2) I L. R., 1 Calc., 328.

claim, and to act accordingly, would be entirely lost. In my opinion the right of the plaintiff to maintenance having become barred prior to the passing of Act IX of 1871, it was also extinguished, and being extinguished it was not revived by the alteration which this Statute made in the period of limitation applicable to suits of this nature.

The result is that the judgments of the Courts below must be reversed, and the suit dismissed with costs; and the plaintiff, respondent, must also pay the costs of this appeal.

PRINSEP, J.—I have had much doubt regarding the construction of the right to sue for maintenance merely because the remedy was barred by Act XIV of 1859, for if it has not been extinguished, the bar to a suit has been revived by the present Limitation Act (IX of 1871); but having regard to the terms of the judgment of the Privy Council in *Gunga Gobind Mundul's case* (1), and the cases decided by this Court which have just been quoted, I feel that I cannot do otherwise than agree in the order which it is proposed to make (2).

Appeal allowed.

Before Mr. Justice Ainslie and Mr. Justice Kennedy.

WOMDA KHANUM (JUDGMENT-DEBTOR) *v.* RAJROOP KOER (DECREE-HOLDER.)*

1877 *Dec.* 20.

Mortgage Decree—Appointment of Manager—Execution Sale—Act VIII of 1859, *s.* 243.

Section 243, Act VIII of 1859, does not apply to a decree on a mortgage, when the decree declares that certain property is to be sold in satisfaction of the mortgage debt. A manager, therefore, cannot be appointed under s. 243 in such a case.

THE plaintiff in this case obtained a decree for sale of certain mortgaged property. At the conclusion of the year of grace,

* Miscellaneous Regular Appeal, Nos. 215, 216, and 217, of 1877, against the order of Baboo Matadin Roy Bahadur, Subordinate Judge of Zilla Gya, dated the 5th of June 1877.

(1) 11 Moore's I. A., 345, S. C., 7 W. R., P. C., 21.

(2) See *Abdul Karim* v. *Manji*. *Hansraj*, I. L. R., 1 Bom., 295; and *Ramchandra* v. *Soma*, *id.*, 305 note.

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execution was taken out for sale of the land in question. The judgment-debtor objected to the sale, and applied for the appointment of a manager under s. 243 of Act VIII of 1859. The lower Court refused the application, whereupon the judgment-debtor appealed to the High Court.

Baboo *Amarendro Nath Chatterjee* for the appellant.

Moonshee *Mahomed Yusoof* for the respondent.

The judgment of the Court was delivered by

AINSLIE, J.—S. 243 does not apply to a decree founded on a mortgage, when that decree declares that certain property is to be sold in satisfaction of the mortgage debt. The creditor's right of sale in such case rests on the mortgage decree, and not on the attachment in execution. The decree cannot be varied by proceedings in execution thereof. The appeal must be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877 *Dec.* 10.

GUNOO SINGH (PLAINTIFF) *v* LATAFUT HOSSAIN AND OTHERS (DEFENDANTS).*

Mortgage—Covenant not to Alienate.

An agreement recited that *A* had executed a bond in favour of *B.*, in which it was declared, "I promise to repay the whole principal, with interest in the month of Phalgun, 1271, F. S., and till payment of the amount I will not transfer any property by conditional sale or mortgage." The bond contained no further proviso declaring invalid future alienations of the lands belonging to *A*, in the manner specified in the bond. *Held*, that the instrument did not operate as a mortgage by *A*.

Lajkumar Ram Gopal Naryan Singh v. *Ram Dutt Chowdhry* (1) distinguished.

ON the 1st of Sawan 1270 Fasli (30th July 1863) one Doulut Singh lent and advanced certain moneys to the

* Special Appeal, No. 2499 of 1876, against the decree of Baboo Mathura Nath Gupta, First Subordinate Judge of Zilla Bhagalpore, dated the 14th of August 1876, reversing the decree of Moulvie Mohamed Nurul Hossein Khan, Munsif of Bagoa Serai, dated the 29th of November 1875.

(1) 5 B. L. R., 264.

defendant Chatru Singh, and in consideration of the loan Chatru Singh executed a bond for the amount, which also contained the following agreement: "I promise to repay the whole, principal with interest, in the month of Phalgun 1271, F.S. (March 1864), and till the payment of the amount I will not transfer any property by conditional sale or mortgage." On the 15th February 1866, the defendant Chatru Singh, in consideration of moneys lent, by a registered mortgage bond mortgaged to the present plaintiff certain lands therein specified the property of the said Chatru Singh. Doulut Singh brought an action on the bond, and obtained a decree on the 29th of March, and, in execution of this decree, attached, and on the 7th August 1869 sold by auction-sale, the lands comprised under the last-mentioned mortgage bond. The present suit was instituted for the recovery of Rs. 663-5 principal and interest due on this mortgage bond, by sale of the land comprised therein.

The lower Appellate Court, overruling the decision of the Court of first instance, found that the prior bond given by the defendant Chatru Singh to Doulut Singh was in the nature of a mortagage deed, and created a valid charge on the property sold under the decree of the 29th March 1866.

The plaintiff preferred a special appeal.

Baboo *Amarendro Nath Chatterjee*, for the appellant.

Mr. *R E. Twidale* and Moonshee *Mohamed Yusoof* for the respondents.

The judgment of the Court was delivered by

GARTH, C.J.—In this case we think that the Subordinate Judge has taken a wrong view of the so-called instrument of mortgage. We consider that it did not amount to a mortgage at all, but that it was merely a covenant not to alienate any property of the debtor until payment of the money advanced. The case decided by the Full Bench—*Rajkumar Ram Gopal Narayan Singh* v. *Ram Dutt Chowdhry* (1)—which has been

(1) 5 B. L. R., 264.

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GOBIND RAM MARWARY v. MATHOORA SABOOYA.

Baboo *Taruck Nath Sen* for the respondents.

JACKSON, J.—The lower Appellate Court dismissed the appeal of the plaintiff, and, it may be said, virtually dismissed his suit, on the ground that notice—that is to say, formal written notice—of dishonour had not been served on the defendants. Now neither the case which the lower Appellate Court cites, *Anunt Ram Agurwala* v. *Nuthall* (1), nor any other case, has been brought to our notice which decides that in this country either a written formal notice of dishonour is necessary, or that the absence of such a notice would be a sufficient defence unless it is shown that by such absence the defendant has been prejudiced. So far, therefore, the judgment of the lower Appellate Court appears to be erroneous, and must be set aside. [The learned Judge then proceeded to consider the other points in the case, and with reference to them, the case was remanded to the lower Appellate Court.]

Case remanded.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

ELIZA SMITH (PLAINTIFF) *v.* THE SECRETARY OF STATE (DEFENDANT).

1878 *Feb.* 18 & *Mar.* 4.

IN THE MATTER OF ACT II OF 1874.

Res Judicata—Civil Procedure Code (Act X of 1877), *s.* 13—*Application under the Administrator-General's Act (XXIV of* 1867), *s.* 60— *Act II of* 1874, *s.* 63—"*Suit.*"

An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of Act X of 1877, and therefore such an application is barred by the disposal of a former application in the same matter under the same section, or under s. 60 of Act XXIV of 1867, which the Act of 1874 repeals : this is so whether the order is one for payment of money or one dismissing the petition.

S. 63, Act II of 1874, contemplates that the money which is the subject of the petition may be claimed by parties other than the applicant, and that

(1) 21 W. R., 62.

those parties may appear and be represented at the hearing; and the words "binding on all parties" were intended to make the order binding upon such parties as well as on the petitioner.

The order passed under that section can be reviewed under s. 623 of Act X of 1877.

APPEAL from a decision of Kennedy, J., dated the 26th of November 1877. From the petition it appeared that, on the 24th of June 1873, the petitioner, Eliza Smith, applied under Act XXIV of 1867 for an order that the defendant should pay to her the sum of Rs. 82,695-8-11, or such other sum as should be in his hands, to the credit of the estate of R. J. H. Magness, deceased, whose neice the petitioner claimed to be. On that hearing an order was made adjourning the hearing, and directing the defendant, out of the monies in his hands belonging to the estate of the said R. J. H. Magness, to pay to Messrs. Robertson, Orr, Harriss, and Francis, the petitioner's attorneys, Rs. 1,000, for the travelling and other expenses of the petitioner and her witnesses to attend before the Court for examination. The further hearing of the application took place on the 8th of July 1873, when witnesses were examined in support of the application; and after hearing evidence, the Judge (Macpherson, J.) expressed his opinion that the petitioner had not proved her identity, and on that ground refused the application. On the 22nd of December 1873, the petitioner applied to the Court to review the former decision, or to grant her leave to renew the application; but that application was refused.

The petitioner subsequently discovered further evidence in the matter, having met with a Mr. DuBois, whom she had previously known, and who recognized her and who made an affidavit in her favor.

The petitioner, with this additional evidence, again applied on the 10th of April 1874 for a rule calling on the Secretary of State to show cause why a review should not be granted, and Macpherson, J., made an order that the petitioner should be at liberty to renew her application for payment to her of the monies in the hands of the defendant belonging to the estate of R. J. H. Magness on notice to the defendant of such application

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On the 10th of August 1874, the petitioner, in accordance with the leave reserved, renewed her application before Pontifex, J. who ordered that it be dismissed, with liberty to the petitioner to renew the application before Macpherson, J. The application was accordingly renewed before Macpherson, J., on the 17th of August 1875, who, not being satisfied with the affidavit of DuBois, dismissed the application. The application on which the order appealed from was made was on further affidavits of a Mr. Johannes and Mr. Patterson, which, she submitted, corroborated the evidence of Mr. DuBois.

The petitioner applied on the 29th of October 1877 to the Comptroller-General by letter, enclosing copies of all her evidence, and received in reply a letter stating that the money would not be paid out to her without an order of Court.

On her application, the following judgment was delivered :—

KENNEDY, J.—In this case it seems to me that one of the principles which operate in inducing the Courts to view with the greatest possible disfavour attempts to reagitate a case once decided applies with more than ordinary force.

The application is one to get out money transferred to Government under the provisions of an Act which contemplates such transfer not being made till after the lapse of very many years. Therefore, in all cases the applications must refer to circumstances at a very distant date. Now lapse of time tells with more deteriorating influence against a true than a false case. The man who tells what he remembers, tells it with greater hesitation and risk of falling into error in proportion to the time that has elapsed. It is not so where a case is not based on memory but on imagination. Here the applicant had an opportunity of coming into Court, making her application and producing all the evidence available, which failed to induce the Judge who tried the case to believe her story. I cannot say that he decided absolutely that her case was false, but he reserved no leave for further application, and at least declined to decide it to be true ; and the question would (to put it at the very best for the petitioner) still remain, is her case false or true? Now if it be

a false case, it would be most dangerous to give her the opportunity of improving the imperfect evidence, and thus making it appear true, especially after the lapse of years had rendered it impossible to produce contradictory evidence, and this danger is one of the reasons for refusing again to agitate a decided issue. On these grounds, as well as on the ground of the necessity for finality, I should have been inclined to think that the ordinary principle of estoppel applies to such applications.

I do not, however, think that I am left to these considerations. The new Procedure Code incorporates all summary and miscellaneous proceedings by directing the procedure thereby prescribed to be followed in all civil proceedings other, than suits and appeals; and by the 13th section, wherever an issue has been determined between the parties, that issue cannot be raised in any other proceeding between them. This is an express provision, as it seems to me, to refuse the application. The application is refused with costs.

From this decision the petitioner appealed, on the ground that s. 13 of Act X of 1877 did not apply to the application so as to prevent the Court from entertaining it; that the refusal of the petitioner's previous applications did not preclude her from making any fresh application in this matter on additional evidence, inasmuch as such previous applications were refused simply on the ground that the Court was not satisfied of the identity of the petitioner as niece of the said Captain Magness, and not on the ground that it was of opinion that the petitioner was not the party she represented herself to be; and that the Court ought to have heard and decided the application, inasmuch as it was based on additional evidence and on the fresh refusal of the Comptroller-General on such evidence, to admit the petitioner's claim without an order of a Court of Justice

Mr. *Jackson* (Mr. *Branson* with him) contended that the application was not barred by s. 13, Act X of 1877, not being a suit within the meaning of that section; and referred to a former case—*Joyrance Dossee* v. *The Secretary of State* (1) —in which two applications were allowed to be made. Act II

(1) Unreported.

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of 1874, s. 63, says that the Court may make such order "for payment of such portion of the claim as justice requires."

[The *Advocate-General.*—I read these words as descriptive of the petition, and not as referring to the order the Court may make.] It is submitted they refer to the nature of the order to be made. Under that section an order refusing payment of any portion would not be binding, as it is not an order for payment. It is in the discretion of the Court to allow any number of applications: if it is of opinion they were improper applications, it has power now, under Act II of 1874, to deal with them in their order as to costs, and not to give costs, or to give them against the applicant. An appeal is precluded in cases where an "order for payment" is made. [MARKBY, J.—Might not the word "binding" have been introduced to bind the Crown, which might otherwise have been considered not bound; in that view it would not bar an appeal.] It is submitted it was intended to bar an appeal in a case supposed by the section: this is not such a case. Any number of applications can be made in case of discovery of fresh evidence. This is an application which it is in the discretion of the Court to grant.

The *Advocate-General*, offg. (Mr. *Paul*) and the *Standing Counsel* (Mr. *J. D. Bell*) for the respondent were not called on

The judgment of the Court was delivered by

GARTH, C.J.—This was an appeal against an order of Mr. Justice Kennedy, dismissing an application made by the plaintiff under s. 63 of Act II of 1874.

His Lordship considered that as a previous application of precisely the same nature had been made under the repealed Administrator-General's (Act No. XXIV of 1867, s. 60) to enforce the same claim, and which had been heard and decided against the applicant, she was barred by s. 13 of the new Civil Procedure Code (Act X of 1877) from renewing the application.

There is no doubt that, in the years 1871 and 1872, Mrs. Smith did apply to the Court under Act XXIV of 1867 to obtain the

sum now claimed, which application was refused; and that, in the year 1873, another application for the same sum was made by her to Mr. Justice Macpherson, which was also refused.

A further application for a review of his order was then made to Mr. Justice Pontifex, which was unsuccessful; and another similar application was afterwards made to Mr. Justice Macpherson, which was also unsuccessful.

The application to Mr. Justice Kennedy was made on the 26th of November last, upon certain fresh evidence, which, it was said, supplied the defects which had previously induced the Courts to decide against the applicant; and it has now been contended before us—

1*st*.—The application is not a suit within the meaning of s. 13 of Act X of 1877, and consequently that the applicant is by law entitled to repeat the application as often as she thinks proper; and

2*ndly*.—That if it were a question for the discretion of the Court to rehear the application or not, the learned Judge ought, in the exercise of that discretion, to have reheard the case, inasmuch as the new evidence, now brought before the Court, was such as the applicant could not, by using reasonable diligence, have procured before.

It will not be necessary for us to enter upon this last point, because we think, upon consideration, that Mr. Justice Kennedy was quite right in deciding that the application was barred under s. 13. It is the first time we believe that the question has been raised since the passing of the new Code, and it is desirable that it should be settled by an Appellate Court.

Section 13 provides "that no Court shall try any suit or issue in which the matter in issue has been heard and finally decided by a Court of competent jurisdiction in a former suit between the same parties."

Now there is no doubt here that the matter in issue, which is the claim made by Mrs. Smith to the fund in question, has been decided in the former application as between her and the Secretary of State; but then it is said, in the first place, that this is not a "suit" properly so called; and in the next place, that the issue in the former case was not finally decided,

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SMITH v SECRETARY OF STATE.

because the only order made upon the application was one dismissing the petition.

The 63rd section of Act II of 1874 (which is in the same terms precisely as s. 60 of the repealed Act XXIV of 1867) enacts "that, on the application being made, the Court shall make such order for payment of such portion of the sum claimed as justice shall require, and that such order shall be binding upon all parties to the suit."

It seems clear from the language here used that the proceeding for which the section provides is to be considered a summary "suit." but the appellant contends that the order made by the Court is not to be binding upon any body, unless it is one for payment of the whole or some portion of the money claimed; or, in other words, that the decision of the Court is to bind the Secretary of State if the applicant succeeds; but that it is not to bind the applicant if the Secretary of State succeeds.

We consider that this is not the true meaning of the section; and that the words "binding upon all parties to the suit" were inserted with a different intention altogether from that which the appellant would ascribe to them. The section contemplates that the money, which is the subject of the petition, may be claimed by parties, other than the applicant; and that those parties may appear and be represented at the hearing, although they may not have joined in the petition; and the words in question appear to be inserted for the purpose of making the order of the Court binding upon those other parties as well as upon the petitioner.

We think, therefore, *first*, that this proceeding must be considered as a "suit;" and *secondly*, that the issue raised in it having been once decided as between the appellant and the Secretary of State, no fresh suit or application can be made which raises the same issue.

This rule need be productive of no injustice, because, if the proceeding is a suit, there is no reason why the order made upon it should not be reviewed under s 623 of the Code; and we are not prepared to say that Mrs. Smith, if an application upon sufficient grounds were made in this case to the Court below,

would not be entitled to a review. That, however, would be a matter entirely in the discretion of the learned Judge who hears the application, and we give no opinion upon it.

The appeal is dismissed with costs.

Appeal dismissed.

Attorney for the appellant: Mr. *Leslie.*

Attorney for the defendant: The *Government Solicitor*, Mr. *Sanderson.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Markby, and Mr. Justice Ainslie.

IN THE MATTER OF THOMSON'S POLICY.*

1877
Dec. 21.

Stamp Act (XVIII of 1869), *ss.* 34, 41, *Sched II, cls* 5, 20—*Policy of Assurance—Assignment and Retransfer by Endorsement.*

A policy of insurance bore three endorsements: the first, an assignment of all the right, title, and interest of the assured to the P Bank; the second, a retransfer from the P Bank to the assured, all claims having been satisfied; the third, an assignment by the assured similar to the first assignment to Messrs. B. R. S. and Company.

Held by MARKBY and AINSLIE, JJ., that the first and third endorsements were liable, as collateral instruments under Sched. II, cl. 20 of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty.

Held by GARTH, C.J., that none of the endorsements were chargeable with duty.

THIS was a reference made by the Board of Revenue, North-Western Provinces, to the High Court, under s. 41 of Act XVIII of 1869. The facts of the case were as follows:—A policy of assurance for Rs. 3,000, issued by the Indian Life Assurance Co.,

* Reference from the Secretary to the Board of Revenue, N.-W. Provinces, under s. 41 of Act XVIII of 1869, dated the 20th August, 1877.

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Limited, in favour of one William McGregor Thomson, bore the three following endorsements:—

"I do hereby assign all right, title, and interest in the within "Life Policy for Rs. 3,000 to the Punjab Bank, Limited.

(Sd) W. McGREGOR THOMSON.

15*th March*, 1872."

"All claims of the Bank under this policy security having "been satisfied, it is hereby retransferred to Mr. William "McGregor Thomson as fully as if it had never been trans- "ferred to this Bank.

(Sd.) T. D. P. MASSON,

Punjab Bank, Limited.

1*st September*, 1874."

"I hereby assign all right, title, and interest in the within Life "Policy for Rs. 3,000 to Messrs. Bheem Ray Sons and Co.

(Sd.) W. McGREGOR THOMSON.

15*th March*, 1875."

The question for the consideration of the High Court was, whether these endorsements should be stamped, and, if so, what stamps they should bear?

The *Advocate-General*, offg. (Mr. *Paul*) and the *Legal Remembrancer* (Mr. *H. Bell*) for the Government.

The following judgments were delivered:—

MARKBY, J., (AINSLIE, J., concurring).— Even if we assume that the transfer of a policy of insurance is a conveyance of property situate in British India so as to be *primâ facie* chargeable under art. 15, Sched. I of the Stamp Act (as to which we express no opinion), still the difficulty arises with regard to the endorsements which the Board of Revenue consider ought to be stamped as conveyances, that it is impossible to say that any specific sum was paid as consideration for either of these transactions.

Under s. 34, vendor and purchaser, in cases of sale, are both required to set forth truly in words the full consideration-money directly or indirectly paid or secured, &c., &c., under certain penalties for failure to do so. Section 11 is restricted in its application to bonds, mortgage-deeds or settlements; and in the case of a conveyance, an option as to the amount of stamp to be used with a corresponding limitation of the rights secured by the instrument, is not allowed.

It appears to us that no penalty could be imposed under s. 34, and that no Court could refuse to receive the instruments before us under s. 18.

The fact is, that the first (and presumably the third instrument) was only *an assignment by way of collateral security* without any consideration, capable of being settled as a sum of money. The consideration for the assignment was apparently a promise to advance money, such loan being primarily secured by a bond separately chargeable with stamp duty. The money paid was not paid as purchase-money of the endorser's interest in the policy.

Nothing was intended to be paid as purchase-money; the whole sum paid was intended to be refunded to the payer. No doubt if the debtor should die before the repayment of the debt, and if the creditor should find it necessary to fall back on the policy for satisfaction thereof, it may be said that he will eventually pay the undischarged balance of the loan, plus the premia paid on the policy subsequent to its assignment, as the price of such assignment; but it is clear that in this view nothing was ever paid in respect of the first assignment, and no one could specify in respect of it or of the third endorsement at the date of its execution (which is the date on which the instrument must be stamped) that anything ever would or will be paid. It follows, that the penal provisions of ss. 18 and 34, which refer to an instrument not properly stamped *at the time of execution*, failed to touch such instruments, for no Court and no Collector can say that an instrument is improperly stamped unless it or he can state what the proper stamp should have been.

We, therefore, think that the first and third endorsements are not chargeable with stamp duty as 'conveyances.' Nor do we consider that the second endorsement is chargeable as the

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acknowledgment of the satisfaction of debt. It is a retransfer of the policy, and nothing more. It merely recites the fact that the debt has been satisfied in order to explain under what circumstances the policy is retransferred.

As collateral instruments not otherwise provided for, the first and third endorsements are, supposing the transaction such as above stated, liable to a stamp of one rupee. The other endorsement is, in our opinion, not chargeable with stamp duty.

GARTH, C J.—I am of opinion that none of the instruments in question endorsed on the policy of assurance are chargeable with duty. I consider that they are not chargeable as 'conveyances,' because the policy of assurance which they purport to transfer, is not 'property' within the meaning of the Stamp Act. It is merely a contract by the assured with the insurance office, which may or may not, according to circumstances, prove a beneficial one to the former. Such a contract, in my opinion, is not included in the definition "property existing in British India."

Even assuming that such a transfer were a conveyance of property within the meaning of the Act, I consider that it would not be chargeable with duty for the reasons given by my learned brothers.

As regards the second instrument, I thing it is not chargeable as an acknowledgment of the satisfaction of a debt, because it does not appear that any debt to the Bank had been satisfied, or that the claims alluded to were debts, or in the nature of debts, or that the amount of the claims, whatever they were, exceeded Rs. 20.

It is possible, no doubt, that the first and third instruments may have been collateral securities; but we have no information to guide us as to whether they do properly come under that description or not, and I feel very strongly that, in giving an opinion upon questions submitted to us by the Board of Revenue, which may serve in the future as "guide to the Board in imposing" taxes upon the public, we are bound to advise upon the *actual facts before us*, and have no right to speculate upon the possible nature of transactions of which we have no certain knowledge.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Mitter.

MAHTAB CHUNDER BAHADOOR, MAHARAJAH OF BURDWAN (JUDGMENT-DEBTOR), *v.* RAMLALL MOOKERJEE (DECREE-HOLDER).*

1877 *Dec. 7.*

Execution of Decree—Interest on Costs.

When a decree gives interest upon the principal sum recovered only, and no mention is made as to interest on costs, the successful party is not entitled to such interest.

THE facts of the case, so far as they are material to this report, are as follows:—On the 21st June, 1876, the Judge of Burdwan passed a decree against the Maharajah of Burdwan, ordering him to pay the decree-holder (the respondent) a certain claim which had been proved against him, together with interest at 5 per cent. and costs.

The decree-holder executed his decree for costs and interest, whereupon the Maharajah made an objection to the payment of interest on the costs, on the ground that the decree was silent as to that point.

The Subordinate Judge overruled the objection, and the Maharajah thereupon preferred the present appeal.

Baboo *Jugadanund Mookerjee* (with him Baboos *Chunder Madhub Ghose* and *Bussunt Coomar Ghose*), for the appellant, contended that the Court below was in error in awarding interest on costs when the decree was silent on the subject; and cited *Mosoodun Lal* v. *Bheekaree Singh* (1), *Ulfutunnissa* v. *Mohan Lal Sukal* (2), *Ameeroonissa Khatoon* v. *Meer Mahomet Mozaffir Hossein Chowdry* (3), *Sadasiva Pillai* v. *Ramalinga Pillai* (4), *Rajah Leelanund Singh* v. *Maharajah Joy Mungul Singh* (5).

* Miscellaneous Regular Appeal, No. 209 of 1877, against the order of the Subordinate Judge of Zilla Hooghly, dated the 11th of May, 1877.

(1) 6 W. R., F. B., Mis. Rul., 109.
(2) 6 B. L. R., App., 33.
(3) 18 W. R., 103.
(4) L. R., 2 I. A., 219.
(5) 15 W. R., 335.

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Baboo *Shamlall Mitter*, for the respondent, argued that the Subordinate Judge rightly overruled the objection that was made as to the non-payment of interest on costs, and quoted *Digamburree Dabee* v. *Nundgopal Banerjee and Jugodumb Dabea* (1), *Kirkland* v. *Modee Pestonjee Khoorsedjee* (2), *per* Knight Bruce, V.C., as authorities showing that interest had been allowed on costs; and *Rajah Lelanund Singh* v. *Maharajah Luckmissur Singh Bahadoor* (3) as analogous to such decision.

The judgment of the Court, delivered by Mitter, J., so far as it is material to this report, was as follows:—

MITTER, J.—In this case two objections have been raised before us in appeal: *First*, that the judgment of the lower Court is wrong in allowing interest upon costs when the decree does not expressly award it. *Secondly*, that the lower Court was not right in awarding interest upon the principal sum decreed after the 18th September, 1876, when the judgment-debtor deposited the money due from him in the Collector's office, and that at any rate the lower Court should not have awarded interest after the date when the Collector of Burdwan by a roobocary informed the Court that he had no objection to pay the money deposited to the decree-holder.

As regards the first question, although it seems that the practice of the Court was not uniform for some time upon this matter, the later decisions establish that this Court has refused to allow interest upon costs in cases where the decree is silent about it. Of these latter cases *Ulfutunnissa* v. *Mohan Lal Sukal* (4) and *Ameroonissa Khatoon* v. *Meer Mahomet Mozaffir Hossein Chowdry* (5) are clearly in point. We think that these decisions are in accordance with the principle laid down in the Full Bench decision (6). Following these decisions, we therefore think that the judgment of the lower Court upon this point is not right. The judgment-creditor is not entitled to interest upon the costs awarded in the decree.

(1) 1 W. R., Mis Ap., 1.
(2) 3 Moore's I. A., 227.
(3) 13 *Ib.*, 490.
(4) 6 B. L. R., App, 93.
(5) 18 W. R., 103.
(6) 6 W. R, F. R, Mis. Rul, 109.

The learned Judge then proceeded to consider the other objection, which is not material to this report.

MARKBY, J.—I concur.

Appeal dismissed.

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MAHTAB CHUNDER BAHADOOR *v.* RAM LALL MOOKERJEE.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

HEMENDRO COOMAR MULLICK, SON OF ROOPLALL MULLICK (PLAINTIFF), *v.* RAJENDROLALL MOONSHEE AND ANOTHER (DEFENDANTS).

1878 *Jany.* 28 *and Feby* 11.

Joint Contractors, Suit against—Res Judicata—Contract Act (IX of 1872), s. 43.

A suit in which a decree has been obtained against one of several joint makers of a promissory note, is a bar to a subsequent suit against the others. The effect of s. 43 of the Contract Act is not to create a joint and several liability in such a case. That section merely prohibits the defendant in such a suit pleading in abatement, and thus places the liability arising from the breach of a joint contract and the liability arising from a tort on the same footing.

The rule laid down in the case of *King* v. *Hoare* (1) and *Brinsmead* v. *Harrison* (2) is one of principle, not merely of procedure.

APPEAL from a decision of Kennedy, J., dated the 20th of August 1877. The suit was brought to recover the sum of Rs. 1,000, with interest at 12 per cent. per annum, due on a promissory note payable on demand, made in Calcutta by one Gourhurry Shaw, in his name and in the names of his partners, the defendants, on the 20th of November 1873. The plaintiff, on the 2nd September 1874, brought a suit against the two present defendants and Gourhurry Shaw on the promissory note, and in that suit the defendants did not appear. The suit was heard as an undefended suit, and the plaintiff obtained a decree against the defendant Gourhurry alone for the whole amount of the note, the decree ordering that the suit should be withdrawn as against the two present defendants with liberty

(1) 13 M. & W., 494, 505.
(2) L. R., 7 C. P., 547.

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to the plaintiff to bring a fresh suit against them for the same matter. No satisfaction of the decree having been obtained, the present suit was brought to recover the amount against the two defendants as to whom the suit had been withdrawn.

At the hearing the preliminary question was suggested by the Court that the suit was not maintainable, and after argument the suit was disposed of on this point.

KENNEDY, J.—In this case I am asked to hold that the 43rd section of the Contract Act converts into a joint and several promise every joint contract, because it makes in the absence of special agreement every joint contract enforcible against any one of two or more joint promissors. I cannot hold that. The Statute makes no further alteration than it professes to do: it leaves the law without the slightest change, except that it abolishes the plea in abatement for non-joinder of defendants in the very cases in which it was available in the later state of the law. Before the Contract Act the promisee could compel one of the promisors to perform a joint and several promise, unless he was met by the plea in abatement; and when he was compelled to make them all parties, yet so soon as judgment was recovered, he could enforce it against any one of them: and we must remember that the question of pleading really had little, if anything, to do with the objection. The language of Parke, B, in *King* v. *Hoare* (1) puts the reason in a very clear light. He says:—"We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tortfeasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other; but for the purpose of this decision they stand on the same footing, whether the action is brought against one or two, it is for the same cause of action. The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable, and so he is in one sense; that if sued seve-

(1) 13 M. & W., 494, 505.

rally, and he does not plead in abatement, he is liable to pay the entire debt: but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of parchment or paper, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." And he proceeds at p. 506, after a reference to the effect of a plea in abatement:—

"These considerations lead us quite satisfactorily to our own minds to the conclusion that where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party."

This decision was referred to and upheld in *Brinsmead* v. *Harrison* (1), affirming the judgment of the Common Pleas (2). Indeed, that being the case of a tort, is somewhat stronger, as in that case a plea in abatement for non-joinder of a defendant could never have been maintained.

How does the question now stand affected by the Contract Act? I confess myself to be wholly unable to see that, except so far as the question of pleading, it has made any difference in the liabilities of the parties. There was a decision of *Ram Nath Roy Choudry* v. *Chunder Seekur Mohapattur* (3), which might seem favorable to the plaintiff's contention. It is not very clearly reported, but it would seem that the bond there was executed only by one party, the person first sued, and the subsequent suit only based on a supposed equitable liability of the defendant. However that may be, the decision was afterwards considered in a case before Sir R. Couch and Ainslie, J. —*Nuthoo Lall Chowdry* v. *Shoukee Lall* (4)—in which the Court dissented from the case of *Ramrutton Roy* (3), which was a decision of the majority (E. Jackson and Trevor, JJ., against Steer, J.), and it was there laid down in express terms (see p. 204) that if there be a joint contract, not a joint and several but a joint contract, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the parties

(1) L. R., 7 C. P., 547.
(2) *Ib.*, 6 C. P, 584.
(3) 4 W. R., 50.
(4) 10 B. L. R., 200.

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who were jointly liable, but were not included in the former suit. This is a direct decision of the Appellate Court, and the language of the Statute by no means contemplates successive suits. This very case shows the necessity of such a rule. A speculative attorney might bring three suits instead of one, and I am bound to put the construction in the language of the Statute, which prevents such an abuse as this—an abuse in the possibility of which Kelly, C.B., much relies in *Brinsmead* v. *Harrison* (1). The plaintiff may select one. He may sue all, but he cannot do both, he must make his selection and abide by it.

In this case, to use the words of Lord Justice Turner in *Ex parte Higgins* (2), the plaintiff has made his deliberate election to pursue his remedy "against one debtor, and that having failed, he is now attempting to have recourse to the others;" and I must, therefore, dismiss this suit against the now defendants with costs on scale 2. The order withdrawing the suit against these defendants with liberty to sue again made as it were behind the backs of these defendants cannot in any way prejudice them.

From this decision the plaintiff appealed. The appellant having died pending the appeal, his son was substituted as a party appellant in the suit.

The ground of appeal was "that the Court was in error in holding that the suit could not be maintained by reason of the judgment recovered in the former suit, the said judgment remaining and being unsatisfied, and leave having been by the said judgment reserved to the plaintiff to bring a fresh suit against the present defendants."

Mr. *Hill* (Mr. *Bonnerjee* with him) for the appellant contended that the suit was not barred. The effect of s. 43 of the Contract Act was to make each one of several joint contractors severally liable; to make every joint contract in fact a joint and several one. Since that Act the case of *King* v. *Hoare* (3) as to a suit against one of two joint debtors being a bar to a suit

(1) L. R., 7 C. P., 547. (2) 3 De Gex. & J., 38.
(3) 13 M. & W., 494, 505.

against the others, would not be law here. Nor would it in England since the passing of the Judicature Act; see the Schedule Order 19. The contract if joint and several is a contract that the creditor may sue the debtors jointly and severally, but each debtor has a right to refuse to be sued alone by pleading in abatement; see *per* Alderson, B., in *King* v. *Hoare* (1), at p. 498. By Statute 3 & 4 Will. IV, c. 42, the plea in abatement was abolished as to a co-contractor out of the jurisdiction; and in *Henry* v. *Goldney* (2) the effect of such abolition was said to be "to make contracts joint and several which at first were joint only," see *per* Pollock, C.B., at p. 499; and that is precisely what I contend is the effect of s. 43 of the Contract Act. Subject to the plea in abatement, "a joint bond is the bond of both obligees, and each of them is bound in the whole"—*Richards* v. *Heather* (3), *Whelpdale's Case* (4)- And where any part of the demand on a joint and several bond remains unsatisfied, you can sue the other of two co-contractors, though judgment has been obtained against one—*Lechmere* v. *Fletchere* (5). [GARTH, C.J.—In the case of tortfeasors you can only sue once.] A case of tort is different, there is only one cause of action; in case of contract there are many, see s. 43 of the Contract Act, s. 43, illus. (a). [MARKBY, J., referred to *Nuthoo Lall Chowdry* v. *Shoukee Lall* (6). How do you get rid of that case?] That case draws a distinction between joint contract and joint and several contract, and it was, moreover, decided before the Contract Act. [MARKBY, J.—Did the Contract Act do more than bring the law in the Presidency towns into the same state as in the mofussil? I never heard of a plea in abatement in the mofussil, though the judgment in that case seems to assume there was.] Several causes of action are created by the contract which nothing done by the plaintiff can defeat. It is submitted that the effect of the plea in abatement by s. 43 is the same as it was held to be in England in the abolition of that plea as to a co-debtor out of the jurisdiction. As to that see *Joll* v. *Curzon* (7). [GARTH, C.J.—The abolition of the plea

(1) 13 M. & W., 494, 505.
(2) 15 M. & W., 494.
(3) I B. & Ald., 33.
(4) 3 Coke's Rep., Part V, 119.
(5) 1 C. & M., 623.
(6) 10 B. L. R., 200.
(7) 4 Com. B., 249.

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in abatement by s. 43 of the Contract Act seems to me to leave the case of a contract in the same position as the case of a tort; and as to torts, the question has been decided by the case of *Brinsmead* v. *Harrison* (1).] In cases of tort the injury sustained by the person complaining is the whole cause of action; the cause of action is whole and undivided. In cases of contract, the cause of action is a breach by *A.* when we sue him; a breach by *B.* when we sue *B.*, and so on, there are several causes of action. There is no *res adjudicata* here to prevent this suit from being maintained. The only *res adjudicata* is under s. 2 Act VIII of 1859. But here the cause of action and the parties are not the same as in the former suit. In the former suit it was decided that Gourhurry Shaw had broken the contract: that is not the question here. Here also there is no merger: no extinguishing of the inferior remedy by the superior as put by Parke, B., in *King* v. *Hoare* (2).

Mr. *T. A. Apcar* and Mr. *Beeby* for the respondents were not called on.

The following judgments were delivered:—

GARTH, C.J.—This suit was brought against the defendants to recover the amount of a promissory note, which was alleged to have been made by them jointly with one Gourhurry Shaw. It appeared from the plaint that a former suit had been brought by the plaintiff against Gourhurry Shaw and the defendants; but as the note was signed by Gourhurry alone, professing to act for himself and the defendants, and as the plaintiff did not prove at the trial that Gourhurry had authority to act for the defendants in making the note, the plaintiff obtained a decree against Gourhurry alone, leave being reserved to the plaintiff by the learned Judge to bring another suit upon the note against the present defendants.

No satisfaction of the debt having been obtained against Gourhurry under the former decree, the plaintiff brought the present suit; but the defendants' object in the first instance that

(1) L. R., 7 C. P., 547. (2) 13 M. & W., 494, 505.

as the liability upon the note was a joint one, the judgment obtained against Gourhurry is a bar to this suit, and that the rule laid down in the case of *King* v. *Hoare* (1) is applicable here. The defendants also raise the question whether the plaintiff had authority to pledge their credit; but if they are right in the question of law, it is not necessary for us to enter upon the question of fact.

The learned Judge in the Court below has decided the point of law in the defendants' favour, and I entirely agree with him.

The rule which was laid down by the Court of Exchequer in the case of *King* v. *Hoare* (1), and subsequently by the Exchequer Chamber in the case of *Brinsmead* v *Harrison* (2) is not a rule of procedure only, but of principle,—*viz.*, that a judgment obtained against one or more of several joint contractors or joint wrong-doers operated as a bar to a second suit against any of the others. There is but one cause of action for the injured party in the case of either a joint contract or a joint tort; and that cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors or joint wrong-doers whom he chooses to sue. If a plaintiff, under such circumstances, were allowed to sue each of his co-debtors or wrong-doers severally in different suits, he would be practically changing a joint into a several liability.

This rule is so fully explained by Baron Parke in *King* v. *Hoare* (1), and by Chief Baron Kelly in *Brinsmead* v. *Harrison* (2), that I do not think it necessary to enlarge further upon it.

It is a rule which in my opinion is founded on strict justice and public convenience; and it has been acted upon in this Court in the case of *Nuthoo Lall Chowdry Shoukee Lall* (3).

It was much pressed upon us in the argument by Mr. Hill, that the effect of s. 43 of the Indian Contract Act is to enable a promisee to sue one or more of his joint promisors severally in two or more suits; or, in other words, to change a joint liability into a several one at the option of the promisee; but this, I conceive, is not the object or effect of the section. It merely

(1) 13 M. & W., 494, 505. (2) L. R., 7 C. P., 547.
(3) 10 B. L. R., 200.

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allows the promisee to sue one or more of several promisors in one suit; and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him.

It is true that the rule upon which I am acting may possibly lead to some hardship in cases when one or more of several co-contractors is out of the jurisdiction, and the plaintiff, if he waits for his return, would be barred by the Statute of Limitation. But this is an injustice which the legislature, if they so pleased, could easily remedy, and which has been, in fact, remedied in England by the Statute of 19 and 20 Vict., c. 97.

I consider, therefore, that the appeal should be dismissed with costs on scale No. 2.

MARKBY, J.—This suit was brought against the defendants to recover the amount due upon a promissory note. It was stated in the plaint that the note was made by one Gourhurry Shaw, who carried on business in partnership with the defendants; that a suit had been previously brought against Gourhurry Shaw and the present defendants; and that on that occasion the plaintiff had obtained a decree against Gourhurry alone. By this decree the former suit as against the present defendants was ordered to be withdrawn at the request of the plaintiff with liberty to the latter to bring a fresh suit against them for the same matter.

It was admitted by the defendants that they carried on business as ordinary traders in partnership with Gourhurry Shaw, and they did not deny the making of the note by Gourhurry; but they denied that Gourhurry had any authority to bind his partners by the note, which they alleged to have been in fact made for the purchase of another business in which Gourhurry was concerned.

No evidence was given in the case, but it is admitted that nothing has been recovered by the plaintiff upon the decree against Gourhurry. The learned Judge below dismissed the suit upon the ground that the plaintiff having elected to take a decree in the former suit against one of the joint-makers of the note only, could not bring another suit against the other joint-makers.

The note was not produced, so that we do not know the exact form of it. The question, however, as I understand it, which is

submitted for our consideration, is this : if several persons carrying on an ordinary trading partnership make a joint promissory note, and one partner be sued upon it and a decree obtained, is any subsequent suit upon the same note against the remaining partners barred, even although nothing has been recovered upon the former decrees ? If this question be answered in the affirmative, the appeal is to be dismissed.

I also understand it to have been conceded on the argument that this is a question which is to be determined by the English Law of Contract, except so far as the same may have been modified by the Indian Contract Act. I think it impossible to deny that, under the English law, this suit would have been barred, and notwithstanding the great authority of Mr. Justice Willes, who seems to think otherwise, I should say, not as a mere rule of procedure, but upon principle of the Law of Contract. If this were a mere matter of procedure, the English law would not necessarily bind us. But I understand Parke, B.'s judgment in *King* v. *Hoare* (1), which is the leading authority, to rest upon this, that, under a joint contract to pay a sum certain, there is but one single obligation which may indeed be enforced severally, but can be enforced once only.

Other principles are stated in the judgment, but they are either based upon rules of pleading not applicable to the case now under consideration, or they apply only to cases where the suit is brought to recover damages and not for a sum certain

Of course, in all questions of this kind, the liability must depend ultimately upon the intention of the parties ; but I consider that it is now finally settled by the law of England that apart from a statute which I shall notice presently, and which is not applicable here, a joint promissory note creates an obligation which can be sued on once only.

If this be, as it seems to me to be, the true mode of stating the law, all difficulty about the further question which has been argued disappears. Mr. Hill contended that s. 43 of the Contract Act did away with the rule that the second suit was barred in such a case as this. But that section does no more than place the liability arising from the breach of a joint contract

(1) 13 M & W., 493, 505.

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and the liability arising from a tort upon the same footing,—that is to say, that each wrong-door is liable to be separately sued in respect of the whole liability. But it does not touch that which has been determined to be the nature of the obligation created by the breach of contract,—namely, that it is one which can be sued on once only.

I have searched into this matter with some care in order to see if the rule laid down in *King* v. *Hoare* (1) was really binding upon us, because if it was not, I think it would requre some consideration how far it is desirable that in such a case as this a note made by an ordinary trading partnership, the second suit should be barred. The rule laid down by Parke, B., in *King* v. *Hoare* (1) is very likely correct in theory. It is at any rate identical, or nearly identical, with the strict rule of the ancient Roman law. But it must be borne in mind that this rule was abolished in the Roman law 1300 years ago; and has been since repudiated in America and everywhere in Europe, except in England. Even in England, until the decision of *King* v. *Hoare* (1) it was very doubtful whether the rule prevailed or not in joint contract; whilst since that time one learned Judge (Sir James Knight Bruce) has spoken of the rule in strong terms of disapprobation (27 L. J., Bank., 29). Lord Mansfield also expressed the opinion in *Rice* v. *Shute* (2) that all contracts with partners were joint and several; and the ruie in *King* v. *Hoare* (1) has been since modified by statute in England. The 19 and 20 Vict., c. 97, s. 11, directs that the period of limitation as to joint-debtors shall run notwithstanding that some are beyond seas; but expressly provides that the creditor shall not be barred as against those out of the jurisdiction by judgment recovered against those who remain within it. If the rule laid down in *King* v. *Hoare* (1) be combined with the law of limitation here, which is very strict, it is by no means clear that a creditor might not very often be left to the choice between a remedy against an insolvent debtor and having his debt barred.

(1) 13 M. & W., 494, 505. (2) 1 Sm. L. C., 6th ed., 513.

I do not deny that there are important considerations of convenience the other way. These considerations have been pointed out and insisted on by several learned Judges of great experience in England, and just now by the Chief Justice. I only say that if I were at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King* v. *Hoare* (1). As it is, however, I am bound to follow that decision, and to hold that this being a case governed by the English law, the learned Judge was right in dismissing the suit.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Remfry* and *Rogers*.

Attorney for the respondent: Baboo *B. M. Doss*.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

DOSS MONEY DOSSEE (DEFENDANT) *v.* JONMENJOY MULLICK (PLAINTIFF).*

1878 *January* 11.

Res Judicata—Simple Mortgage Bond—Mortgagee's Lien—Money Decree—Mortgagor's Right, Title, and Interest sold—Registration Act—Summary Procedure under—Act XX of 1866, *s.* 53—*Act VIII of* 1859, *s.* 2.

A having a simple mortgage bond, which was specially registered, obtained a summary decree under the provisions of the Registration Act, and attached the lands under mortgage to him. Prior to *A's* decree these lands had been attached by other creditors and subsequent to *A's* decree they were sold to *B* After such sale, *A*, under his attachment, sold the right, title, and interest of the mortgagor which he himself purchased. *A* now sued the mortgagor and *B* to enforce his mortgage lien against the mortgaged properties.

Held that, according to the decision of *Syud Eman Momtaz-ood-deen Mahomed* v. *Rajcoomar Doss* (2), the suit should be dismissed

* Special Appeal, No. 60 of 1877, against the decree of L R. Tottenham, Esq, Judge of Zillah Midnapore, dated the 30th August 1876, reversing the decree of Baboo Jadoonath Roy, Subordinate Judge of that district, dated the 21st June 1876.

(1) 13 M. & W, 464, 505. (2) 14 B. L. R., 408.

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Quære.—Whether s. 7 of Act VIII of 1859 would not be an answer to the suit as full relief might have been given in the summary suit?

THE plaintiff had a simple mortgage bond, dated 10th January 1871. The bond was specially registered and charged the lands in suit with other properties. Certain creditors of the mortgagor attached the land under mortgage, and the sale was fixed for 24th February 1871. In the meantime, and on the 21st February 1871, the plaintiff obtained a summary decree under the provisions of the Registration Act (Act XX of 1866), s. 53.

The lands were sold under the creditors' attachment and purchased by the defendant. The plaintiff, on 30th July 1871, sold the right, title, and interest of the mortgagor in the mortgaged land under an attachment issued under his summary decree, and became the purchaser thereof. Being unable to reap the fruit of his purchase owing to the antecedent sale of the defendant, he now sued the mortgagor and the defendant to enforce his lien against the mortgaged properties. The Subordinate Judge dismissed the plaintiff's suit, but on appeal his order was set aside, and a decree passed, declaring that the property in suit was liable to be sold in satisfaction of the plaintiff's decree of the 21st February 1871. The auction-purchaser now appealed.

Baboos *Srinath Dass* and *Bhowani Churn Dutt* for the appellant.

Baboos *Mohini Mohun Roy* and *Rash Behary Ghose* for the respondent.

The judgment of the Court was delivered by

KENNEDY, J.—(after stating the facts as above mentioned, and remarking that it was difficult to believe that the plaintiff, when he obtained his decree, was not aware of the immediate proximity of the sale, or that the course he took was not adopted in reference to that fact, continued as follows):—The present suit is brought against the mortgagor and the first auction-purchaser to enforce the lien created by the mortgage bond against these lands.

The difficulty in which the plaintiff has been placed is entirely one of his own creation. Instead of suing the mortgagor on his bond, and obtaining a decree declaring his lien and directing the lands to be sold towards satisfaction of it, he adopted a course which ensured the lands being sold so as to realize the smallest price possible. The course is one frequently adopted in Bengal, but this frequency cannot make it less liable to be stigmatized as oppressive if not fraudulent

However this may be, the question for us now to decide is, whether the present suit can be maintained, and we have come to the conclusion that it cannot; and that the decision of the Full Bench in *Haran Chunder Ghose* v. *Dinobundhoo Bose* (1) precludes us from giving the relief he sought.

In the second suit, which was before the Full Bench, it appears that the nature of the proceedings must have been precisely the same as those here, for Mr. Justice Jackson says, that in it "the plaintiff sought a fresh decree for the unsatisfied portion of his claim, as well as a declaration of lien as against the alienees. Upon the considerations already stated, I am of opinion that the Munsif, who granted only the latter prayer, was right, and that the Judge, who altered the decree, was wrong." The majority of the Bench, however, did not concur in this opinion, and both cases were dismissed.

We are unable to distinguish that case from the present, and think that we are bound to follow it notwithstanding some observations which were made in the judgment of the majority, which would be inconsistent with the ultimate decision, if they could be construed as the respondent here contends. Possibly, they would apply in cases where the property had been alienated before the institution of summary proceedings by the mortgagee, and this view would reconcile with the Full Bench decision the ruling of Glover and Mitter, JJ., in *Aruth Soar* v. *Juggunath Mahapathur* (2), in which it appears that certainly before the decree the mortgaged property had been sold.

Here there being no intervening charge or interest, the plaintiff deliberately elected, for his own reasons, to take a mere

(1) 14 B. L. R., 408; S. C., 23 W. R., 187. (2) 23 W. R., 461.

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money-decree against the mortgagor. The Full Bench did not think it necessary to decide the question raised under s. 7 of the Procedure Code, and for the same reason we need not now do so; but it is by no means certain that the operation of that section would not in itself be an answer to this suit, as a suit in which full relief could have been given, might, at the time of the summary decree, have been instituted against the mortgagor. We decide nothing about any other remedy which may be open to the mortgagee, but we must restore the judgment of the Subordinate Judge.

Appeal decreed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.

1878 *Feb.* 18.

THE EMPRESS *v.* BAIDANATH DAS.*

Offence punishable by Fine and Confiscation—Act XXI of 1856, *s.* 49—*Offences triable in a summary way —Summons Cases—Sentence— Criminal Procedure Code (Act X of* 1872), *ss.* 4, 8, 148, 149, *&* 222.

An offence under s. 49 of Act XXI of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.

THE prisoner in this case was charged with the illegal possession of ganja, convicted under s. 49 of Act XXI of 1856, and sentenced by the Joint-Magistrate of Rungpore to a fine of Rs. 100, or in default, to rigorous imprisonment for one month. The Sessions Judge, referring to the case of *Judoonath Shaha* (1), was of opinion that the order was illegal, as the Joint-Magistrate had no power to try the case summarily or to pass sentence of rigorous imprisonment. He, therefore, referred the case under s. 296, Act X of 1872.

* Criminal Reference, No. 48 of 1877, by H. Beveridge, Esq , Officiating Sessions Judge of Rungpore, dated the 30th August 1877.

(1) 23 W. R., Cr. Rul., 33.

The High Court (MARKBY and PRINSEP, JJ.) held that the sentence of rigorous imprisonment was illegal, and modified the order in that respect. They referred the question as to whether the offence could or could not be tried in a summary way to a Full Bench with the following remarks :—

PRINSEP, J. (MARKBY, J., concurring).—The matter which remains for our decision is, whether an offence under s. 49, Act XXI of 1856, can be tried summarily by a Magistrate under s. 222 of the Code of Criminal Procedure.

The punishment for that offence, on which this matter depends, is thus described; the offender "shall forfeit for every such offence a sum not exceeding Rs. 200." It is further stated, "and the liquors and drugs, together with the vessels, packages, and coverings in which they are found, and the animals and conveyances used in carrying them, shall be liable to confiscation."

Section 222 of the Code declares that the Magistrate of the district may try certain offences in a summary way, and among these offences are "offences referred to in s. 148 of this Code." Such offences are described in the Code, s. 4, as "summons cases," see definition.

Section 148 is to the following effect: "When a complaint is made before a Magistrate having jurisdiction in the case that any person has committed, or is suspected of having committed, any offence triable by such Magistrate, and punishable with fine only, or with imprisonment for a period not exceeding six months, or with both, the Magistrate may issue his summons directed to such person, requiring him to appear at a certain time and place before such Magistrate to answer to the complaint."

So only offences punishable with "fine only, or imprisonment for a period not exceeding six months, or both," would be triable in a summary way under the first clause to s. 222 already quoted.

Is an offence under s. 49, Act XXI of 1856, one punishable with fine only, or does the confiscation which follows on conviction form a part of the punishment, so as to alter the character of the offence as regards the mode of trial to be adopted?

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In two reported decisions of this Court—*Khetter Mohun Chowrunghee* (1) and *Judoonath Shaha* (2)—it has been held that such offences are not summons cases, and therefore are not triable in a summary way, because they are punishable with confiscation as well as with fine.

We have great doubts regarding the correctness of those decisions—doubts which, we would add, are shared by the only Judge of this Court now present, who was a party to one of those decisions. We are informed that Magistrates constantly try offences of this description, summarily, probably in ignorance of the rule laid down in these decisions; and we, therefore, think it right to submit the matter to be authoritatively settled by a Full Bench of this Court.

We are inclined to hold that such an offence can be tried summarily as a "summary case," for the following reasons, which we state, because the parties to this case are unrepresented, and therefore it is not probable that there will be any argument at the bar.

For the procedure in the trial of offences, the Code has divided them into three classes:

Summons cases, defined in s. 148; warrant cases, defined in s. 149; sessions cases, or trials in the Court of Session, defined in s. 4.

If the offence under s. 49, Act XXI of 1856, is not a summons case, it must be either a warrant case or a sessions case, and whatever opinion may be expressed regarding its falling under the category of summons cases, it clearly cannot fall within either of the two other classes. No special mode of trial has been prescribed for such an offence, and it is difficult to suppose that such cases were overlooked by the Legislature.

The proper solution of this difficulty seems to be to regard confiscation not as a punishment contemplated by the Code of Procedure so as to affect the mode of trial.

It may be said that a sentence is the declaration of the punishment imposed. Section 20 of the Code of Criminal Procedure sets forth the powers of Magistrates in passing sen-

(1) 22 W. R., Cr. Rul., 43. (2) 23 W. R., Cr., Rul., 33.

tence, and these powers are limited to imprisonment, fine, and whipping. It is in consideration only of such punishments that the Code has prescribed the different modes of trial, and though confiscation of certain articles may be awarded on conviction of any offence under a special or revenue law, such confiscation is not taken into account by the Code so as to form a portion of the sentence, or to affect the nature of the offence or the mode of trial.

Further, we observe that s. 8 of the Code, in providing for the trial of offences under local or special laws, states that "no Court shall award any sentence in excess of its powers," and the powers of Magistrates in respect to passing sentences on persons convicted are set forth in s. 20, which, as already stated, only refers to three kinds of punishments—imprisonment, fine, and whipping. Confiscation under Act XXI of 1856, and also under the Salt Act, can, however, be ordered by a Magistrate.

Under these circumstances, we are inclined to hold that confiscation is no part of the sentence or punishment under the Code of Criminal Procedure, but that it follows as a consequence of the conviction.

The question referred is that stated in the first paragraph of this reference. If the answer to the question be in the affirmative, the conviction will stand. If the answer be in the negative, the conviction and sentence, including the order of confiscation, will be set aside and a new trial ordered.

No one appeared on either side before the Full Bench.

The judgment of the Full Bench was delivered by

GARTH, C.J.—We are clearly of opinion that an offence under s. 49, Act XXI of 1856 can be tried summarily by a Magistrate under s. 222 of the Criminal Procedure Code.

The confiscation, which is provided for by s. 49, is merely a consequence of the conviction, and does not form part of the punishment for the offence. We observe that, in the case of *Khetter Mohun Chowrunghee* (1), to which we are referred, the

(1) 22 W. R., Cr. Rul., 43.

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question which we are called upon to decide was given up by the Government Pleader without argument; and that in the second case the learned Judges merely followed the ruling in the first, so that this would appear to be the first occasion on which the point has been seriously considered.

ORIGINAL CIVIL.

1878 *Feb.* 18.

NARAIN SINGH *v.* RAM LALL MOOKERJEE.

Practice—Immoveable Property situate in different districts—Leave to admit Plaint—Civil Procedure Code (Act X of 1877*), ss.* 2, 19*—Charter Act, cl.* 12.

Under s. 19 of the Civil Procedure Code, it is not necessary to obtain the leave of the Court to sue in respect of immoveable property situate partly within, and partly without, the ordinary original civil jurisdiction of the High Court.

THIS was a suit respecting immoveable property, part of which was situate within, and part without, the jurisdiction of the Court.

Mr. *Moyle* now moved to admit the plaint under cl. 12 of the Charter Act.

Mr. *Bonnerjee* as *amicus curiæ* called the attention of the Court to s. 19 of the Civil Procedure Code, which says that if a suit be to obtain relief respecting property or compensation for wrong to immoveable property situate within the limits of different districts, the suit may be instituted in any Court otherwise competent to try it within whose jurisdiction any portion of the property is situate; and to s. 2, which defines "district" as including the local limits of the ordinary original civil jurisdiction of a High Court; and asked whether applications of this nature should, for the future, be made under cl. 12 of the Charter or not.

PONTIFEX, J., admitted the plaint, and said that s. 19 of the Code gave the Court jurisdiction, and that it was not necessary to apply under cl. 12 of the Charter.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Mitter.

SOBHA BIBEE (DECREE-HOLDER) *v.* MIRZA SAKHAMUT ALI AND OTHERS (JUDGMENT-DEBTORS).*

1878 *Jany.* 4.

Act VIII of 1859, *ss.* 208 *and* 364—*Application for Execution of Decree—Right of Appeal—Act XXIII of* 1861, *s.* 11.

Where a decree had been purchased *benami*, and the party alleging herself to be the real purchaser had not been put upon the record as a party, and an application for execution made by her under s. 208 of Act VIII of 1859 had been refused, and there was a dispute as to who was the real purchaser of the decree,—*Held*, that the applicant was not a party to the suit within the meaning of s. 11 of Act XXIII of 1861, and had no right of appeal against the order refusing her application (1).

Abidunnissa Khatoon v. *Amirunnissa Khatoon* (2) followed.

APPLICATION under s. 208 of Act VIII of 1859.

The applicant, alleging herself to be the purchaser of a certain decree, applied to the Subordinate Judge of Dacca to be placed on the record as decree-holder and also for execution of the decree. It appeared that the decree had been purchased *benami* by a mukhtear for and on behalf of some person or persons whose names did not appear on the record; and that there had been a litigation between the applicant and certain other parties, in which it was decided by the High Court, on the 6th of January 1875, that the applicant had no interest in the decree. The Subordinate Judge rejected the application.

On appeal to the High Court:

Baboo *Mohini Mohan Roy* appeared for the appellant.

Munshi *Serajul Islam* for the respondents.

* Miscellaneous Regular Appeal, No. 263 of 1877, against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Zilla Dacca, dated the 16th of June 1877.

(1) Compare s. 244 of the Civil Procedure Code (Act X of 1877).

(2) I. L. R., 2 Calc., 327; S. C., L. R., 4 I. A., 66.

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SOBHA BIBEE v. MIRZA SAKHAMUT ALI.

The following judgments were delivered:—

WHITE, J.—The appellant in this case applied, under ss. 208 of the Code of 1859, for leave to execute a decree, which she alleged she had purchased at an auction-sale. The Court below, taking into consideration a certain judgment that had been passed by this Court in a suit to which the present appellant was a party, has decided that she is not entitled to take out execution of the decree, and, accordingly, has refused her application.

Now, by the 364th section of the Code, no appeal lies against this order, unless an express provision can be found in the Code which allows of an appeal. The only express provision is contained in s. 283 of the Code. This section has been repealed by Act XXIII of 1861, and s. 11 of the latter Act has taken its place. Hence, unless the appellant has a right of appeal under s. 11 of Act XXIII of 1861, she cannot carry the case further so far as the present suit is concerned. The only part of s. 11 which we need consider is that which directs that questions "arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal." It is perfectly clear that Sobha Bibee, the appellant, is not technically a party to this suit. She purchased, according to her statement, the decree on the 16th June 1870, and on the 5th July she applied to be made a party, but her application was refused.

It is argued, however, upon the authority of *Hurro Lal, Dass* v. *Soojawut Ali* (1), that, although she has not been made a party to the suit, she is yet within the meaning of the 11th section, because she has by her purchase become the assignee of the decree, and as such is entitled to be made a party. We think that the doctrine laid down in *Hurro Lall Dass* v. *Soojawut Ali* (1), if it be not taken to be overruled by the recent decision of the Privy Council in *Abidunnissa Khatoon* v. *Amirunissa Khatoon* (2), must at least be considered as confined to

(1) 8 W. R., 197.

(2) Compare s. 244 of the Civil Procedure Code (Act X of 1877).

cases in which there is no dispute as to the assignment of the decree having taken place, or as to the person who is the assignee. Their Lordships in dealing with the case before them, which in principle is substantially the same as the present, and in considering the judgment of the late Chief Justice of this Court, expressed their concurrence with the view which he had taken, *viz.*, that the 208th section of Act VIII of 1859 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. That being so, it is clear that where such a contest existed, a party claiming to be the assignee of the decree would not be entitled to succeed in an application for execution made under s. 208 of the Code, and for the same reason would not be entitled to be made party to the suit. In no sense therefore could he be considered as coming within the meaning of s. 11 of Act XXIII of 1861. That there is a serious contest in this case as to the party who is the real transferee of this decree there cannot, we think, be a shadow of doubt, for it appears upon the proceedings that the purchase was originally made by a mukhtear *benami* for somebody else. Who that somebody else is, whether the present applicant or not, has been the subject of litigation, and is not yet finally determined. The certificate of sale was issued in the name of Fukeerunnissa, one of the defendants. She has tried to establish her title, and has failed. Her case came before this Court in 1875, in a suit to which the present applicant was a party, and this Court whilst negativing Fukeerunnissa's claim pronounced a very strong opinion that the present appellant had no title to be considered a *boná fide* transferee of the decree, but that a third person was the real purchaser. It is not necessary to determine now who is the real assignee of the decree. It is sufficient to say that it is a question which admits of very considerable doubt.

It appears to us, therefore, that the appellant who has neither been made a party to the suit nor is entitled to be made a party, cannot in any view of the case be treated as coming within the purview of s. 11. That being so by force of the 364th section of the Code of 1859, she has no right of appeal, and her case, so far as the proceedings in this suit are concerned, must rest where it is left by the lower Court.

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The appeal, therefore, will be dismissed with costs.

MITTER, J —I am also of the opinion that, in this case, Sobha Bibee has no right of appeal. She applied under s. 208, Act VIII of 1859, as a transferee, to execute a decree which was obtained by a third party, and which she alleged she had purchased in execution of a decree against that third party. For reasons stated in the judgment of the lower Court, her application to execute the decree as a transferee under s 208 of the Procedure Code of 1859 has been refused. The question before us is, whether this order is open to appeal under s. 11 of Act XXIII of 1861, as it has been pointed out by my learned brother. S. 364 of the Code distinctly prohibits an appeal, unless there is an express provision in that Code. The contention of the appellant is that that express provision is to be found in the section mentioned above, *viz.* s. 11 of Act XXIII of 1861. The Privy Council, in the case already quoted, have distinctly decided against that contention. They, after referring to the fact that the case before them was not a case in which the Court executing the decree should have entertained an application under s. 208, observe that "they are further fortified in this view by the consideration that, under s. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under s. 208." They have distinctly, therefore, held in that case that no appeal lies from any judgment or decision given in a proceeding under s. 208 of Act VIII of 1859. One of the reasons given by their Lordships for coming to this conclusion is, that in no sense is an applicant who applies to be put upon the record on the ground that he has acquired a title to the decree by transfer a party to the suit unless his application is actually granted. Referring to the position of the applicant in that case, they say, "he was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree, but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit." The same observations will apply here. An alleged transferee by merely applying for execution of the decree does not constitute himself a party to the suit.

I am, therefore, of opinion that, in this case, the judgment of the lower Court under s. 208 of Act VIII of 1859, is not open to appeal.

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Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

BOONJAD MATHOOR AND OTHERS (PLAINTIFFS) *v.* NATHOO SHAHOO (DEFENDANT).*

1877 *Jany.* 17.

Arbitration, matter referred to—Arbitrators doubting correctness of their decision—Award, validity and finality of—Appeal, right of—Act VIII of 1859, *ss.* 325, 327.

Matters in dispute were referred to the arbitration of five persons, of whom four made their award on 27th August 1875. On 3rd September the same arbitrators granted an application for rehearing. Before the matter was reheard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. On 21st February 1876 an application was made to the Court to have the award filed, which was opposed. The Court overruled the objection, and ordering the award to be filed gave a decree to the plaintiffs *Held*, that the award was not a valid and final award, that the decree passed thereon was not final, and that an appeal would lie (1).

Sashti Charan Chatterjee v. *Taruck Chunder Chatterjee* (2) considered.

THE facts in this case are as follows :—

The parties appeared to have referred certain matters in dispute between them to arbitration by five persons named in the plaint. The course of proceedings before the arbitrators was not very clear, but it would seem that four of them made an award on the 27th August 1875. On the 3rd September, or five

* Special Appeal No. 746 of 1877, against the decree of J. M. Lowis, Esq., Judge of Zilla Bhagulpore, dated the 19th March 1877, reversing the decree of Baboo Barhma Dutt, First Sudder Munsif of Monghyr, dated the 19th April 1876.

(1) See also *Gunga Narain Ghose* v. *Ram Chand Ghose*, 12 B. L. R., 48.

(2) 8 B. L R., 315.

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days afterwards, the same arbitrators granted an application made by one of the parties for a rehearing of the matter. Before the rehearing had taken place, one of the four died, and finally an order appears to have been made by two of the survivors striking off the application. On the 21st of February, or within one day of the expiration of the six months allowed by law, certain of the parties interested made an application to the Court under s. 327 of the Code of Civil Procedure that the award might be filed, and thereupon Nathoo Shahoo, the other party interested, showed cause against the award being filed He submitted that the award not being unanimous, an application at the instance of the defendant had been made to the arbitrators for a review. That such application had been admitted, the usual notice issued to the parties interested, and a day fixed, the 15th November 1875, for the hearing of the further evidence. That in consequence of the laches of the arbitrators no final order had been made. He further contended that under such circumstances the agreement between the parties referring the suit to arbitration had become void by the death of one of the arbitrators at a time subsequent to the order admitting the award to review. On this state of facts the Munsiff appears to have considered, not that the arbitrators were incompetent to rehear the matters in arbitration, but that a final and conclusive order rejecting the application for rehearing had been made by two of the arbitrators. He also remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrators, and thought that, according to the provisions of s. 378 of Act VIII of 1859, the order rejecting the review was final. The Munsiff. further said:—"For rejecting the petition the concurrence of opinion of two arbitrators is sufficient. There is now no bar to the enforcement of the said award." He, therefore, ordered the award to be filed, and gave a decree for the plaintiff as to the said award being valid and correct.

On appeal the District Judge held that the view taken by the Munsiff was erroneous. He considered that the order striking off the case was not the act of the whole of the arbitrators, and that by the very fact of their having admitted the case to be

re-heard, they tacitly expressed a doubt as to the justice of their first award, and that until the question was again considered, their first award could not be looked upon as final. The Judge therefore thought it inadvisable to give such an award the force of a decree, and therefore reversed the decision of the Munsiff.

The plaintiffs now appealed.

Baboo *Mohesh Chandra Chowdhry* (Mr. *Sandel* with him) for the appellants contended that there was no appeal from the decision of the Court of first instance, inasmuch as the decree passed, in accordance with the award, was final, and referred to *Sreenath Chatterjee* v. *Koilash Chunder Chatterjee* (1).

Mr. *Gregory* (Baboo *Amarendra Nath Chatterjee* with him) for the respondents, relied on *Sashti Charan Chatterjee* v. *Taruck Chandra Chatterjee* (2).

Baboo *Mohesh Chandra Chowdhry* replied.

The judgment of the Court was delivered by

JACKSON, J. (After stating the facts of the case as mentioned above, proceeded as follows):—The Munsiff cursorily remarked upon the insufficiency of the stamp on which the petition of review was filed before the arbitrator. I should have thought that no stamp was required. He also thought that according to the provision of s. 378 of Act VIII of 1859 the order in rejection of the review was final. It seems to me clear *that* could not possibly be a ground of judgment in this case. [The learned Judge then alluded to the judgment of the lower Appellate Court.]

It has been contended before us in special appeal that the lower Appellate Court had no jurisdiction to make this order, inasmuch as the Munsiff having made a decree in accordance with an award of arbitrators, that decree was by law final. And Baboo Mohesh Chunder Chowdhry referred us to *Sreenath*

(1) 21 W. R., 248. (2) 8 B. L., 315.

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Chatterji v. *Koilash Chunder Chatterjee* (1), in which judgment was given by the late Chief Justice Sir Richard Couch, of which the head-note is to the effect that s. 327 of the old Code of Civil Procedure "incorporates the provision in s. 325 as to the finality of the judgment given according to the award, and puts the award filed under s. 327 in the same position as the award filed under s. 325; where a Court files an arbitration award and passes a decree, that decree is final." The question to be considered here was very fully considered by the Full Bench in *Sashti Charan Chatterjee* v. *Taruck Chundra Chatterjee* (2). It is not very easy to ascertain what was the decision of the Full Bench in that case, because separate judgments were given, which did not all agree, but the opinion of the late Mr. Justice Norman, who was then acting as the Chief Justice, in which opinion I concurred, was this, that where there has been an award, and the decree passed by the Court below is in accordance with that award, that judgment is final; but where it can be shown that there was not in fact any award on which a judgment could be based, there is no final decree, and an appeal would lie. In this case the defendant had to show cause against the finality of the award, and he did show what appears to me to be a very satisfactory cause. He showed that the arbitrators, after making the award and after an interval of only a very few days, had expressed a doubt as to the correctness of the award by intimating their readiness to reconsider their decision. It may be observed that the award was not one of the whole number of arbitrators but of four out of five; and if even we assume that in the reference to arbitration provision was made that in case of difference of opinion the decision should rest with the majority, still the fact that one of the number had dissented ought to be taken into account when it is seen that the remaining arbitrators expressed a readiness to reconsider their decision. It may very well be that but for the death of one of these four, and what took place consequently, there might have been a further award by the same arbitrators in which the conclusion would have been different from that arrived at on the 27th August. It was never,

(1) 21 W. R., 248. (2) 8 B. L. R, 315.

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I think, the intention of the Act that the Court should bind parties by the result of a private arbitration when the arbitrators themselves plainly showed that they doubted the correctness of their decision. That, it appears to me, was an extremely strong and valid objection to the finality of the award—one which tended to show that the award was no valid award, and therefore it was a matter which the lower Appellate Court could consider on appeal. I think, therefore, the Judge of the Court below was not in error in the decision which he arrived at in this case, and that this appeal ought to be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

THE EMPRESS ON THE PROSECUTION OF MICHELL *v.* JOGGESSUR MOCHI.*

1878 *Jany.* 24.

Government Currency Note, Theft of—Title of Original Owner—Appealable Order—Criminal Procedure Code (Act X of 1872), *ss.* 418 *&* 419—*Cashing a Currency Note—Sale Contract Act, ss.* 74, 76, *and* 108.

A Government currency note was stolen from *A*, and cashed by *B* in good faith for *C*. On the conviction of *C* for theft, the Magistrate ordered the note to be given to *B*. *A* appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of appeal under s. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court.

Held, that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held further, that the provisions of s. 76 of the Contract Act did not apply as the change of a currency note for money is not a contract of sale; and that as the note came honestly into the hands of *B*, the order of the Magistrate was right.

* Criminal Reference, No. 223 of 1877, by H. T. Prinsep, Esq., Sessions Judge of the 24-Pergunnahs, dated the 13th of December 1877.

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THE facts of this case appear sufficiently from the memorandum of reference made by the Sessions Judge, which ran as follows:

"This is an application questioning the propriety of an order "passed by the Joint-Magistrate under s. 418 of the Code of "Criminal Procedure, by which a currency note of Rs. 100, found "to have been stolen from Captain Michell, has, on conviction of "the thief, been given to Subal Chunder Poddar, with whom it was "cashed by the thief, rather than to its original owner. When "this application was first made to me, I thought that, having "regard to the terms of s. 419, the petitioner had the right of "appeal; but, on reconsideration, I am of opinion that no appeal "lies *only* from such an order. There is no express provision of "law allowing an appeal only against an order under s. 418, and "therefore it would seem that, under s. 286, no appeal can be "entertained. The terms of s. 419 would seem to refer to a "case in which an appeal has been lawfully made against an order "of conviction or acquittal, and an order under s. 418 being a "part or consequence of such order, thus comes under consider-"ation by the 'Court of appeal, reference or revision,' who are "empowered to order that order to be 'stayed, or may modify, "alter or reverse it.' In this view of the law, as the application "made to me concerns only the matter dealt with under s. 418, "I am of opinion that I am not competent to interfere as a Court "of appeal; but as I am also of opinion that the order of the "Joint-Magistrate is contrary to law, I submit the case for the "orders of the Honorable High Court.

"As far as the evidence goes, there is no reason to doubt the "honesty of the *Poddar* with whom the currency note was cashed "by the thief. The question is, whether the *Poddar* should be "allowed to retain it as against its original owner from whom it "was stolen. It seems to me that this is a matter which can "properly be dealt with by a Magistrate; but that the order "passed by the Joint-Magistrate, though it is an accordance with "the principles of the law of England, is not in accordance with "s. 108 of the Contract Act. Currency notes would seem to be "'goods' within the definition given in s. 76 of that Act, and

"therefore this case is similar to that given in illustration (*a*) "to s. 108.

"I think it right, however, to state that the case of the *Collec-* "*tor of Salem* (1) would seem to lay down different view of "our law; but in that case the position of Government was "alone under consideration, and the judgment seems to have "proceeded on the ground that, under the law, the Government "treasury officer was bound to cash a currency note, and that "therefore the Government was protected against any claim if "it should happen that a note so cashed was a stolen note. In "the present case there was no such obligation on the *Poddar*, "and though the result of an order directing him to give it up to "the person from whom it was stolen would seem to be some-"what unreasonable, it is in my opinion in accordance with our "law in India, and therefore I feel bound to submit the matter "for the orders of the Honorable High Court."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

AINSLIE, J.—We think that the Sessions Judge might have disposed of this case under s. 419, Criminal Procedure Code, without a reference to this Court.

The words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is at the moment pending. It may very often happen, as in this case, that the question of the propriety of an order under s. 418 for the disposal of any property produced before the Court may in no way concern the convicted person; and we think it unreasonable to put such a construction on s. 419 as shall make the power of the Judge to modify, alter or annul a Magistrate's order affecting one, contingent on the accident whether another person has or has not chosen to appeal

S. 286, by the words "except in the cases provided for by this Act" must include cases in which the power to alter or annul the order of a Magistrate is expressly given.

We are further of opinion that the case does not call for our interference. It is admitted in the order of reference that the

(1) 7 Mad., 233.

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note came honestly into the hands of the *Poddar*, to whom it has been returned by the Magistrate. The Sessions Judge refers to s. 108 of the Indian Contract Act, and to the definition of 'goods' in s. 76 of the same Act, in which, for the purposes of that particular chapter dealing with contracts of sale, the word is defined.

No one has appeared to argue the points raised before us. As at present advised, we are of opinion that the provisions of the Contract Act do not apply to this case. The change of a Government currency note for money is no more a contract of sale than the payment of the same note over the counter of goods is a sale of the note for the goods. In this last case the note is paid as money being "legal tender" for the amount expressed therein under s. 15, Act III of 1871. S. 77 of the Contract Act defines 'sale' to be the exchange of property for a price, but this is the exchange of money in one form for money in another form. Either form being legal tender, it is impossible to say that one is the price of the other. If we are to look to s. 76 of the Contract Act, we must read it with s. 77, and this latter section shows that the provisions of that Act do not apply in this case.

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plaintiff a decree for the amount of rent named in the *ex parte* decree. On appeal the Judge reversed that decree, and held that execution of the former decree being barred, it was inadmissible in evidence to show the rate of rent due.

On special appeal (before Couch, C. J., and Ainslie, J.)—

The Court differing from the decision given in *Ram Soonder Tewaree* v. *Sreenath Dewasi* (1), cited in support of the judgment given by the lower Appellate Court, referred the point to a Full Bench, who, in an opinion quoted by the Court in the present appeal, remanded the case for rehearing by the District Court. On remand this Court was of opinion that as the decree sought to be put in evidence was an *ex parte* decree, no value could be assigned to it in proof of the plaintiffs' claim, and in turn remanded the case to the Munsif's Court for re-trial, with directions to ignore the said decree as an element of proof in the case. On the re-trial, the Court of first instance, on evidence taken independently of the decree, held that the plaintiff was not entitled to what it described as the enhanced rate claimed, and granted a decree for Rs. 26 13 annas. The lower Appellate Court in effect upheld the decision of the Court below, increasing, however, the sum named in the decree to 49 rupees. The defendant hereupon appealed to the High Court; the case being heard by a single Judge.

Baboo *Bharut Chunder Dutt* for the appellant.

Baboo *Kali Mohun Dass* and Baboo *Doorga Mohun Dass* for the respondent.

AINSLIE, J. (after disposing of two other grounds which had been taken and which are immaterial to this report, continued):—"It is further said that no notice of enhancement has been served upon the defendant before the institution of this suit. The Judge has, throughout his judgment, spoken of this as an enhancement suit, but it is quite clear that he is in error on this point. There was a decree for the rents of the year 1278, and in this present suit the rents of

(1) 14 B. L. R., 371 note; S. C., 10 W. R., 215.

the year 1279 are claimed at the rates mentioned in that decree. Although that decree was *ex parte*, yet it has never been set aside as fraudulently or dishonestly obtained. The fact that it was not put into execution is immaterial, the only result is that the plaintiff has lost a certain sum of money; but as far as the decree declared what was the amount payable by the defendant to the plaintiff for the year 1278, it, as admitted by the Judge, stands good. The rent for 1278 then being fixed at Rs. 74 odd annas, the claim for the same rent for the year 1279 cannot in any sense be called a suit for enhanced rent, and consequently no notice was required. Then it is said that the enhancement has been made upon wrong grounds; that the Court was bound to take into consideration the rents payable by other talookdars of similar degree in the neighbourhood, and ought not to have proceeded upon evidence as to the increased production of the land. This, however, is entirely a new point raised at the end of 4½ years' litigation, and cannot now be entertained.

"Lastly, the special appellant urges that it is not for him to prove what was the actual income, but for the plaintiff. It appears to me that the answer to that is simple. When one party has in his possession of necessity the means of proving that which is necessary to establish the affirmative or the negative of a certain issue, the burden of proof is thrown upon him.

"In cross-appeal it was urged that the Court below was wrong in not giving some weight to the decree for the year 1278, and that, if the Judge had done so, the rest of the evidence considered by the light of that decree would have been in favour of the plaintiff. On turning to the remand order in which the Judge considered the weight to be given to the previous decree, it seems to me that he there held that in the present case that decree was really of no value, because it had been given without entering into any discussion of the question now at issue and upon which evidence has been tendered on either side, and that it cannot in any way guide him to a decision on the evidence in this case. The appeal is dismissed with costs."

The plaintiff appealed from this decision under cl. 15 of the Letters Patent.

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Baboo *Kali Mohun Dass*, Baboo *Doorga Mohun Dass*, and Baboo *Bama Churn Banerjee* for the appellant.

Baboo *Hurro Mohun Chuckerbutty* for the respondent.

The judgment of the Court was delivered by

GARTH, C.J.—We think that, in this case, the lower Court is in error, through misconstruing the meaning of the Full Bench decision—*Beer Chunder Manick Bahadoor* v. *Ramkishen Shaw* (1).

The plaintiff sued the defendant for rent due for the year 1279 at the same rate which had been decreed to him for the previous year 1278, in a suit which he had brought against the same defendant for rent of the same property, and the plaintiff relied upon that former decree as almost conclusive evidence of the proper amount due to him from the defendant.

It seems that this decree for the rent of 1278 was obtained by the plaintiff *ex parte*, the defendant not appearing at the trial; and it is admitted that no execution had ever been taken out by the plaintiff upon the decree, and that his right to take out execution had been barred by limitation.

The Court of first instance held that this former decree was evidence against the defendant in the present suit, and gave judgment for the plaintiff for the same amount, namely, Rs. 74.

The Officiating Judge on appeal reversed the Munsif's judgment, on the ground that as no steps had been taken by the plaintiff to execute the decree for the rent of 1278, and the period of limitation had been allowed to elapse, the decree itself became inoperative, and could not be kept alive for purposes of evidence any more than for purposes of execution. This view was supported by the case of *Ram Soondar Teware* v. *Sreenath Dewasi* (2); and when this case came up to the High Court on special appeal, the point thus decided by the Judge was referred to a Full Bench; and the Full Bench decision upon it is in the case of *Maharajah Beer Chunder Manick Bahadoor* v. *Ram*

(1) 14 B. L. R., 370; S. C., 23W. R., 128.

(2) 14 B. L. R., 371 note, S. C., 10 W. R., 215.

kishen Shaw (1), and is in these words:—Couch, C. J., says:—"We are of opinion that the decree is admissible in evidence. The question of its value when admitted is to be determined by the lower Courts. The defendant has alleged that it was obtained fraudulently. It does not appear that he gave any evidence of this, and it will be for the Court to say whether there is any evidence of that allegation. The decree of the Officiating Judge must be reversed, and the suit remanded to him for re-hearing."

The case then went back to the Officiating Judge, and he found, apparently upon no other grounds than that the decree had been obtained *ex parte*, and that no evidence had been given on the part of the defendant at the former trial that the decree was of no value, and ought to be disregarded.

The case was then remanded by the lower Court to the Munsif to try the question of amount *de novo* without reference to the former decree; and this has resulted, after a long litigation, in the plaintiff recovering Rs. 49, being a much smaller sum than was adjudged to him by the former decree.

Now in dealing with the decree in this way, we consider that the Judge was practically ignoring the true meaning of the High Court's judgment.

The High Court were perfectly aware that the former decree was made *ex parte*. They knew that the decree had passed without any evidence on the part of the defendant, and if that fact had been sufficient to invalidate the decree, or to render it of no value for the purposes of evidence in the present suit, they would of course have said so, and would not have remanded the case to the Officiating Judge for re-trial.

What the Full Bench judgment, in our view of the matter, really meant was this: that an *ex parte* decree is *primâ facie* for purposes of evidence as good as any other decree, and as binding between the parties upon the matter decided by it. But that if the defendant could show, as he said he was prepared to do, that the former decree was obtained by fraud, or that it was irregular, or contrary to natural justice or the like, the

(1) 14 B. L. R., 370, S. C., 23 W. R., 128.

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ex parte decree, although of force between the parties in the suit in which it was given, might be properly considered as of no value for the purposes of evidence in any other suit.

It seems clear that this was the meaning of the Full Bench, because while they knew that the former decree had been obtained *ex parte*, and therefore evidently considered that fact alone as insufficient to destroy the value of the decree for purposes of evidence, they say that the defendant alleged that the decree had been obtained by fraud, and that it must be for the Court below to say whether that allegation was proved.

But when the case came again before the Officiating Judge, it does not appear that the defendant gave any evidence of fraud, or that he made any attempt to show that the decree in the former suit had been obtained otherwise than honestly and properly. The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendant.

In this we consider he was quite wrong: a decree obtained *ex parte* is in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. If it were not so, a defendant in a rent-suit might always by not appearing, and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definitive judgment as to what is the proper amount of rent due from him to his landlord.

If a defendant does not think it worth while to contest the suit, but allows the plaintiff's evidence, and the judgment passed upon it, to go unquestioned, he has no right afterwards to dispute the correctness or the value of the judgment, merely because he chose to absent himself from the trial.

Of course if any fresh circumstances had arisen since the former decree was made, which would justify on the one hand an abatement, or on the other hand an enhancement, of the rent decreed in the former suit, the Court would be bound to take such circumstance into consideration. But no evidence of this kind was adduced by the defendant in the present case. The only materials which he brought forward upon which the judgment of the Court below ultimately proceeded, consisted of

evidence which the defendant might and could have brought forward, if he had so pleased, in the former suit, and which he offered no excuse for not producing on that occasion.

We think, therefore, that the principle upon which we decided the case of *Nobo Doorga Dossee* v. *Foyz Buksh Chowdhry* (1), and which has been acted upon by this Court in other cases, applies with equal force here.

We consider, for the reasons given by the learned Judge in the Court below, that no notice of enhancement was necessary before bringing this suit, and we think that the Munsif was right in the first instance in adjudging to the plaintiff the same rate of rent as was decreed to him in the former suit.

The decree will therefore be altered in that respect; but, as this long series of litigation has arisen from the misconception of the Full Bench judgment by the Officiating Judge, we think that each of the parties should pay their own costs of the proceedings subsequent to that judgment.

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

THE EMPRESS ON THE PROSECUTION OF JOHARDI SHEIK *v.* HEMATULLA.*

1878 *Feby.* 12.

Criminal Procedure Code (Act X of 1872), *s.* 215—*Evidence for the Prosecution—Examination of Witnesses.*

A Magistrate is bound, before he discharges an accused person under s 215 of the Criminal Procedure to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution.

THE complainant Johardi in this case charged another man with forcibly cutting paddy. The Deputy Magistrate to whom the case was referred took evidence as to the possession of the

* Criminal Reference, No. 1114 of 1878, from F. W. J. Rees, Esq., Offg. Magistrate of Maldah, dated the 5th of February 1878.

(1) I. L. R., 1 Calc., 202; S. C., 24 W. R., 403.

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land and crop in dispute. The complainant produced four witnesses, of whom the Deputy Magistrate examined two only, because (as it appeared) the remaining two witnesses were only cognizant of the same facts as the two previously examined. After hearing both sides the Deputy Magistrate discharged the accused under s. 215 of the Code of Criminal Procedure, because the evidence for the prosecution did not clearly establish the sowing of the crop by the complainant.

The Magistrate was of opinion that the other two witnesses ought to have been examined, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—The Deputy Magistrate was bound, under s. 215 of the Criminal Procedure Code, to hear all the witnesses for the prosecution. We direct that he do this, and then pass such order on the case as the evidence appears to him to call for.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1878 *March 7.*

DEBENDRONATH MULLICK AND OTHERS v. ODIT CHURN MULLICK.

Cause of Action—Right to turn of Worship.

A refusal to deliver up an idol, whereby the person demanding it was prevented from performing his turn of worship on a specified date, gives the party aggrieved a right to sue for damages.

THE plaintiffs in this case alleged that they were entitled to perform the worship of a deity, Ranee Thakooranee, on a certain day in the year 1284, B.S. (1877-78); and that they had been prevented from performing such worship on the day in question through the refusal of the defendant to deliver up to them the said deity for such purpose. The plaintiffs further alleged that, in consequence of such refusal, they had been disgraced in the eyes of the other members of the family,

and that they had lost the benefits from a religious point of view and otherwise, which they would have enjoyed if they had performed the worship in their turn. The damages claimed were Rs. 5,000.

The case coming up for settlement of issues Mr. *Phillips* for the defendant raised the point whether the plaint disclosed any cause of action.

Mr. *Hill* for the plaintiffs.—A right vested in the plaintiffs to a turn of worship; if there is a right, there must be a remedy; see *Ashby* v. *White* (1). A turn of worship is described as "property" by Couch, C.J., in *Mitta Kunth Audhicarry* v. *Neerunjun Audhicarry* (2). See also *Anund Moyee Choudrain* v *Boykantnath Roy* (3) and *Gour Mohan Chowdhry* v. *Madan Mohan Chowdhry* (4).

Mr. *Phillips* for the defendant.—The loss (if any) suffered by the plaintiffs is a purely spiritual one. It is impossible to estimate damages on such loss The rule in *Ashby* v. *White* (1) refers to purely temporal damages. [PONTIFEX, J.—The plaintiffs state that they have been disgraced in the eyes of the family.]

PONTIFEX, J, was of opinion that the plaint did disclose a cause of action, and allowed other issues in the case to be settled.

Attorneys for the plaintiff: Messrs. *Beeby* and *Rutter*.

Attorney for the defendant: Mr. *Paliologus*.

(1) 1 Smith's L C, 251, 276.
(2) 14 B. L. R, 166.
(3) 8 W. R., 193
(4) 6 B. L R, 352.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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Jany. 6 & 9 and Feby. 11.

MOTHOORMOHUN ROY (PLAINTIFF) *v.* THE BANK OF BENGAL (DEFENDANTS).

Bank of Bengal Act (XI of 1876), ss 17, 21—Registration of Transfer—Right of Bank to refuse to Register.

The Bank of Bengal is entitled to refuse to register a transfer of shares when the application is made during the time the transfer books of the Bank are closed under the powers given by s. 21, Act XI of 1876, and after a public notification in accordance therewith.

Though the Bank may not have given this reason for not registering at the time of the application being made, they are entitled to avail themselves of it subsequently, when a suit is brought to compel them to register the transfer.

Section 17 of Act XI of 1876, which entitles the Bank of Bengal to refuse to register the transfer of shares until payment of any debts due by the person in whose name the shares stand, refers only to debts which are presently payable; therefore, where *R* was indebted to the Bank, and give bills as security therefor—*held*, the Bank would not be entitled to refuse under s. 17 to register the transfer during the currency of the bills.

APPEAL from a decision of Macpherson, J., dated the 10th of August 1877. The suit was brought by the plaintiff, a merchant in Calcutta, to obtain an order directing the defendants to register the transfer of a stock certificate in the defendants' Bank for Rs. 17,458-8-8, which had been pledged to the plaintiff by one Radha Gobind Shaw, to secure certain advances. The plaintiff's case was, that he applied to the Bank to register this transfer about the 14th of June 1876, and he was then told by the Bank officers that, before the certificate could be registered, it must be endorsed by Radha Gobind Shaw, or his duly constituted attorney. Upon this the plaintiff obtained from Radha Gobind a power-of-attorney, dated the 27th of June, empowering one Otool Behary Dhur to make the transfer of the certificate to him; that the transfer was accordingly made, and that the plaintiff sent it to the Bank to be registered on the 1st of July; but that the officers of the Bank then refused to register it, on the ground that Radha Gobind Shaw was indebted to them in a large amount, and as long as his debt remained unpaid, the transfer could not be registered.

On the 3rd of July, the plaintiff stated, he caused another application to be made to the Bank, to know why the transfer could not be registered; and was informed that so long as Radha Gobind Shaw was indebted to the Bank they could not register it. And again, on the 31st of July, he alleged that, having ascertained that Radha Gobind Shaw had made an arrangement with the Bank, by which the payment of his debt to them was postponed to a future day, he again applied to the Bank to have the transfer registered, but was refused upon the same ground as before.

The plaintiff's contention was, that the Bank was bound to register the transfer upon the application made on the 1st of July, because, although Radha Gobind Shaw had no doubt, given bills to the Bank to a large amount, none of these bills had then arrived at maturity; and he further contended that they were bound to register the transfer on the 31st of July, although in the meantime the bills had arrived at maturity, because an agreement had then been made between Radha Gobind Shaw and the Bank, on the 8th of July, by which he pledged property to a large amount to secure the payment of the bills, and that the payment was postponed by that agreement till the 1st of October following, so that on the 31st of July there was no debt due from him to the Bank which they could at that time have enforced.

The case of the defendants was that with regard to the applications alleged to have been made on the 1st and 3rd of July, the plaintiff's case was entirely untrue. They admitted that, early in July, the plaintiff's son applied for the dividends due upon the stock standing in Radha Gobind's name, and was refused upon the ground that Radha Gobind was indebted to the Bank; but they stated that no application was made to register this transfer till the 31st July, and that although they admit that an arrangement was made with Radha Gobind Shaw on the 8th of July, by which the payment of most of the bills was postponed till the 1st of October 1876, there were two bills which became due on the 22nd and 24th of July for Rs. 5,000 each, which were not included in that arrangement, and that consequently, on the 31st of July, there was a debt of

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Rs. 10,000 due from Radha Gobind to the Bank, the payment of which the latter might then have enforced.

The defendants further alleged, with reference to the applications said to have been made on the 1st and 3rd of July, that, even, assuming the plaintiff's case were true, the transfer was not made or tendered to the Bank for registration in such a form as the Bank were bound to recognize; and, moreover, that, from the 1st to the 15th of July inclusive, the Bank transfer books were closed in accordance with the provisions of s. 21 of their Act (XI of 1876), and that, consequently, the Bank were not bound, and according to their usual course of business, were not in a position, to register the transfer during that period.

The case came on for hearing before Macpherson, J., who found on the evidence that the plaintiff had failed to prove that any demand for transfer was made until the end of July; and holding that when such demand was made Radha Gobind Shaw was indebted to the Bank, and that the Bank was entitled to refuse to transfer, dismissed the suit with costs on scale 2.

From this decision the plaintiff appealed.

Mr. *J. D. Bell*, Mr. *Branson*, and Mr. *Bonnerjee* for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Evans*, ann Mr. *Stokoe* for the respondents.

The following cases were referred to in argument. As to there being a debt to the Bank during the currency of the bills: *In re Stockton Malleable Iron Company* (1); *In re The London, Birmingham, and South Staffordshire Banking Company* (2). As to the right of the Bank to justify its refusal to transfer on the ground of the books being closed, though that objection was not raised by them when the application for transfer was made: *Ousely* v. *Plowden* (3). As to the mode of transfer: *Hibblewhite* v. *M'Morine* (4).

(1) L. R., 2 Ch. D., 101.
(2) 34 Beav., 332.
(3) 1 Boulnois, 145.
(4) 6 M. and W., 200.

The judgment of the Court was delivered by

GARTH, C. J., who (after stating both the plaintiff's and defendants' cases as set out above, and the grounds on which the defendants relied as entitling them to refuse to transfer, continued.)—The Bank was also at one time under the impression that even during the currency of the bills, when the Bank had no present right to sue Radha Gobind upon them, they could still, under the 17th section of the Act (XI of 1876) refuse to register the transfer. But this is clearly not so. The language and the evident intention of that section points to a *present debt only* as conferring a right upon the Bank to refuse either to register a transfer, or to pay dividends; and this view is strongly fortified by the English case of *In re The Stockton Malleable Iron Company* (1), in which it was held that the words 'due' and 'indebted' in the Articles of Association of a trading company, which gave to the company a lien upon shares similar to that given by this Act to the defendants, must be taken to refer to debts presently payable.

With reference, however, to the demand of registration alleged to have been made on the 31st of July, it has been distinctly proved that two bills of Radha Gobind, which matured on the 14th and 22nd of July, were not (for some reason or other) included in the mortgage arrangement which was made between the Bank and Radha Gobind on the 8th, so that the amount of these bills was due to the Bank on the 31st; and the Bank was therefore clearly justified in refusing the transfer on that day.

The plaintiff's case, therefore, wholly depends upon the application which is said to have been made on 1st and 3rd of July.

(After dealing shortly with the case on its merits, the learned Chief Justice continued) :—

We think, therefore, in substance that there is no reason to disbelieve the plaintiff as to the applications to register the transfer which were made on the 1st and 3rd of July.

But then arises the formidable objection which was made by the defendants in the Court below, but which it was then not necessary to consider, that the application for the registration of

(1) L. R., 2 Ch. D, 101

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the transfer was made during the period when the books were closed. We consider that this objection must prevail.

In order to entitle the plaintiff to ask the Court for a mandatory order, directing the Bank to register the transfer, it is clear that the plaintiff must show, in the first instance, that he applied for such registration at a time and under circumstances when the Bank was enabled and bound to comply with his request.

It was impossible for the Bank to comply with it at a time when the books were closed, and although that reason for not registering might not have been given by the Bank when the application was made, we think that they have a perfect right to avail themselves of it now, because it is one which, in justice to their other customers and to the public, they could not, by any extraordinary exception in the plaintiff's favour or otherwise, have removed, and it is one too of which the plaintiff, in common with the rest of the public, must be taken to have been aware, because the power under which the closing of the transfer book took place is conferred upon the Bank by Act XI of 1876, s. 21 (a public Act): and the fact that the transfer books would be closed on the 1st and 3rd of July was publicly notified by the Bank in accordance with the statutory direction.

We are of opinion, therefore, for these reasons that the plaintiff's case must fail; and that this appeal should be dismissed with costs on scale 2.

Appeal dismissed.

Attorneys for the plaintiff: Messrs. *Swinhoe* and *Co.*

Attorneys for the defendants: Messrs *Chauntrell, Knowles,* and *Roberts.*

PRIVY COUNCIL.

NORENDER NARAIN SINGH (PLAINTIFF) *v.* DWARKA LAL MUNDUR AND OTHERS (DEFENDANTS).

P. C.*
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Nov. 21 & 22.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Mortgage—Foreclosure—Notification—Regulation XVII of 1806, *s.* 8.

The condition of foreclosure required by s. 8, Regulation XVII of 1806 is that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property.

In an action brought to recover possession as upon a foreclosure it is essential for the plaintiff to satisfy the Court that the above condition has been complied with.

In such a case the service of the notice must be established by evidence. The mere return of the Nazir on the back of the Judge's perwannah to the effect that the mortgagor had been duly served is not legal evidence of service.

The functions of the Judge under s. 8 are merely ministerial; see *Forbes* v. *Ameeroonissa Begum* (1).

The year during which the mortgagor may redeem runs not from the date of the perwannah, or the issuing of it by the Judge, but from the time of service.

Mohesh Chunder Sein v. *Mussumat Tarinee* (2) approved.

Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the motgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it.

Quære.—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only?

The mortgagee when he seeks to foreclose must discover and serve notice on those who are the then owners of the estate.

IN the suit in which this appeal arose, the plaintiff as mortgagee of certain lands, under a deed of conditional sale, sought,

* *Present* :—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

(1) 10 Moo. I. A., 340, 350. (2) 10 W. R., F. B., 27.

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as against the mortgagors, and against parties who had subsequently purchased portions of the lands from them, to have effect given to proceedings taken by him for foreclosure. The defendants contended that the deed of conditional sale was merely a colourable transaction, and was not intended by the parties executing it to operate as a *bonâ fide* instrument. Some of the defendants further contended that not having had due notice of the proceedings in foreclosure, they could not be affected by these proceedings.

On the 18th April 1873, the Subordinate Judge of Bhagulpore, in whose Court the suit was brought, held that the deed of conditional sale was a valid instrument, and that all the legal requirements for foreclosure had been complied with. He accordingly gave a decree in favour of the plaintiff.

On the 13th April 1874, the case came before a Division Bench of the High Court on regular appeal, when the decision of the Subordinate Judge was reversed, and the suit dismissed.

The judgment of the Division Bench (Phear and Morris, JJ.) was as follows:—

"The plaintiff in this case says that in November 1858, his ancestor purchased from certain vendors, called the conditional vendors, 5 annas 3 gundas 1 cowri and 1 krant share of mouzah Mudehpoora, subject to redemption by the vendors on repayment of the consideration money, Rs. 5,000; that he afterwards, between September 1861 and January 1868, purchased out and out from some of the mortgagors or conditional vendors their respective shares in the mortgaged property, amounting in the whole to 1 anna 15 gundas 2 cowris: these purchases must, of course, have been each subject to the mortgage of November 1858.

The plaintiff then says that in June 1867, he caused due notification of foreclosure to be given to the conditional vendors through the Bhagulpore Civil Court; and that the mortgage money has not since been paid. And upon this title he brings this suit to obtain possession, not of the whole of the mortgaged property, but of the difference between the 5 annas odd, originally mortgaged to his ancestor, and the 1 anna odd, purchased by him subsequently to the mortgage; that is, of 3 annas 7 gundas 3 cowris and 1 krant.

The plaintiff also asks for partition in his plaint; but he does not say what share he wants to have divided from the remainder of the property, or who his co-sharers are. And although he brings this suit as I have mentioned to recover possession of 3 anna 7 gundas 3 cowris 1 krant of the joint property, he does not say who of the defendants, 21 in number, are now enjoying this share or are keeping him from it, or even whether or not any of them are in possession of any portion of it; nor does he state any facts which would serve to connect any one of the defendants with the particular property or shares of property which is the subject of the mortgage.

Of these 21 defendants, we are only concerned on this appeal with two sets, namely, one set, which may be termed Chooni Mundur's set, and the other Kunhya Lall Mundur's. Both these sets of defendants say that they are in possession of a certain share of this joint property; and they admit that they purchased what they have from some of the alleged mortgagors, a part of it at any rate after the date of the alleged mortgage deed. But they admit nothing more. Both of them object that the conditional sale was not a real trasnaction, even if it had existence at all which they deny, and that they know nothing about the foreclosure.

Now it is quite plain on this state of facts that the plaintiff must, in order to make out a title to recover, first prove not only that the property was mortgaged to him or to his ancestor as he alleges it was in 1858, but that he caused effective notification to be given to the representatives of the original mortgagors in June 1867, the date when he says that he caused notification to issue. But we find no proof of service of the notification upon the original vendors or their representatives anywhere in the record. The utmost that we find tending in this direction is a petition which is said to have been filed on the occasion of the foreclosure proceedings as they have been termed. Now this petition can at the most show that the petitioners themselves admit that they had notice of foreclosure. It cannot be evidence of all the original mortgagors other than the petitioners or their representatives, having had notice of the foreclosure. And if any one of the mortgagors or his respresentative was not

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duly served with notice then the plaintiff must fail to establish his title by foreclosure.

In this state of the case it is hardly perhaps necessary for us to mention that one of the original mortgagors, who was called as a witness, expressly stated that notice of the foreclosure was not served upon him. It thus seems to be quite clear that the plaintiff has failed to make the very first step which he was obliged to take in order to prove his title to the property and the right to recover as against the appealing defendants.

But we further observe that even if he had proved that the foreclosure had been duly effected, he would still have to prove that the share of this joint property which the appealing defendants admitted that they had got from some of the mortgagors was in fact a share or a portion of a share of the joint property which was the subject of the original mortgage. But there is no attempt, as far as we can see, made by the plaintiff to prove this. It must be remembered that the property mortgaged was but 5 annas 3 gundas odd share out of the 16 annas; and the whole of the remaining shareholders have not been brought before the Court,—or rather, I should say, that none of them have been. There is in truth a total failure of proof that the plaintiff is entitled to recover the share of the joint property which is in the hands of either of the two appealing defendants. It therefore follows that the plaintiff's suit ought to have been dismissed. We are of opinion that the decree of the Subordinate Judge is wrong and must be reversed—and as against the appealing defendants the suit must be dismissed with costs in both the Courts.

I intended to have mentioned as a most important fact bearing upon the merits of the plaintiff's claim that in the different transactions of purchase which the plaintiff himself refers to, made by him or on his behalf between 1858 and 1868, there is no mentionw hatever of the conditional sale upon which the plaintiff now relies; yet, as I have already remarked, these sales must have been effected subject to that mortgage, if that mortgage had existed."

From this decision the plaintiff appealed to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the appellant.—The deed of conditional sale was a valid instrument, and there is sufficient evidence of a due compliance with the requirements of s. 8, Regulation XVII of 1806, in regard to proceedings in foreclosure. In the foreclosure proceedings the Zillah Judge had recorded that the necessary notices had been regularly served. This, if not conclusive, was at any rate *primâ facie* evidence that such was the case. [Sir R. COLLIER.—In proceedings taken for foreclosure are the functions of the Judge ministerial or judicial? Sir M. SMITH referred to *Meer Abbas Ali* v. *Nund Coomar Ghose* (1), in which it was held that so far as the issue and service of notice were concerned, the Judge is to enquire and record judicially whether matters have been properly conducted. Mr. *Arathoon* referred to *Forbes* v. *Ameeroonissa Begum* (2).] The respondents had notice, and they appeared upon that notice. Personal service of the notice was not essential— *Musst. Koonjoy Sutbhama* v. *Sheopursun Singh* (3). Moreover, the respondents, who were purchasers from the mortgagors, were not entitled to be served with notice, since they had not taken possession. Assuming that there had been a failure to serve notice on some of the mortgagors that would not affect the mortgagee's right as against those of the mortgagors who had been served. If the foreclosure was regular, the appellant was entitled to the shares of the mortgagors to the extent to which they purported to mortgage them. If it appeared doubtful what was the exact interest of each mortgagor at the date of the mortgage, further enquiry on that point should have been directed.

Mr. *C. W. Arathoon* for the respondents.—The deed of conditional sale was collusive and colourable. If valid, it was not shown to cover the portions of property claimed. Due service of notice as required by s. 8, Regulation XVII of 1806, had not been proved. Such proof must be given—*Syud Eusuf Ali Khan* v. *Mussamut Azumtoonnissa* (4), *Madho Singh* v. *Mathab Singh* (5). The object of notice is to fix the mortgagors

(1) 7 W. R., 123
(2) 10 Moo. I. A., 340.
(3) S. D. A., 1854, p. 281.
(4) W. R, 1864, Gap. No, p. 49
(5) 3 All H. C. R., 325.

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with knowledge that the period within which he must redeem has begun to run. That period runs from the date of service of notice, not from the date of its issue—*Mohesh Chunder Sein* v. *Mussamunt Tarinee* (1). Notice should have been given to the mortgagors, but also to those who had purchased from them prior to the foreclosure proceedings. Such purchasers are the epresentatives of the mortgagors within the meaning of s. 8, Regulation XVII of 1806—*Sheo Golam Singh* v. *Ramroop Singh* (2), *Bhanoomutty Chowdhrain* v. *Premchand Neogy* (3), *Mohun Lall Sookool* v. *Goluck Chunder Dutt* (4). Under the provisions of s. 8 of Regulation XVII, a demand for payment is a condition precedent to the right to institute foreclosure proceedings—*Forbes* v. *Ameeroonissa Begum* (5). But no such demand had been made.

Mr. *Leith* replied.

At the close of the argument their Lordships' judgment was delivered by

SIR M. E. SMITH.—This is an appeal in a suit brought by the heirs of Rajah Tek Narain Singh against certain parties, who may be described as the family of Dass, forming one set of defendants, and persons called Mundur who formed another set, the latter being purchasers of the property in question from the Dasses. The suit was brought for possession and for registration of names (as stated in the plaint), "with respect to 3 annas 7 gundas 3 cowries 1 krant out of 5 annas 3 gundas 1 cowrie 1 krant of Mouzah Dooram Mudehpoora 'usli' with 'dakhili' Pergunnah Nesingpore Koora, the property referred to in the deed of conditional sale, after deducting 1 anna 15 gundas 2 cowries, the right and interest of Sri Narain Dass, Bachee Lal Dass, Rajah Ram Dass, Muhtab Dass *alias* Laljee Dass, and Chunchal Kishore Dass, purchased by your petitioner's ancestor, and the right and interest of

(1) 10 W R., F B., 27.
(2) 23 W. R., 25.
(3) 23 W. R, 96
(4) 10 Moo. I A., 1.
(5) 10 Moo. I. A., 340.

Shunkur Batti purchased at auction on the 10th of January 1868, subsequent to acquiring the deed of conditional purchase, at an execution-sale by your petitioner." The conclusion of the plaint is: "Since the principal and interest of the mortgage was neither deposited nor paid by the vendors pursuant to the terms of the mortgage bond, the foreclosure, in accordance with the Regulation XVII of 1806, was formally effected in the Judge's Court at Bhagulpore by a proceeding dated the 23rd June 1867, and the period of one year fixed by the above law expired on the 27th February 1868, and within that period the amount entered in the bond and interest were not paid, and the conditional sale aforesaid became absolute on the 27th of February 1868, corresponding with the 19th Falgoon 1275 F.S., and the cause of action for the possession and mesne profit arose from the same date."

This action, therefore, is brought after proceedings for foreclosure had been taken upon the deed of conditional sale referred to in the plaint, and to give effect to those proceedings. This deed is dated the 30th of November 1858; it is from numerous members of the family of Dass, in all 19; the deed states that they had "sold and transferred all and every the 5 annas 3 gundas 1 cowrie 1 krant of the entire 16 annas original with dependencies in Mouzah Dooram Mudehpoora," in lieu of Rs. 5,000, which had been advanced by Rajah Tek Narain Singh. The further statement is: "We have received the consideration-money in full, in one lump sum, in cash from the said vendee, and brought the same into our possession and enjoyment. We execute this deed of conditional-sale for two years in lieu of the said consideration, and delivering it to the vendee, hereby declare and give in writing that the said vendee shall enter into possession and occupancy of the property sold by right of purchase as proprietor. We promise that in the space of two years from the date of this deed of sale we shall pay the consideration-money in question, in cash, in one lump sum to the vendee aforesaid, and take this deed of sale back. In case we do not repay the consideration in question, the vendee shall, after the expiration of the time, be at liberty to foreclose and complete the sale under the provisions of Regulation

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XVII of 1806 A. D., and enter into possession and occupancy of the property sold, and to have his own name registered in the Government records in the column of proprietor."

It seems that the Rajah did not take possession, and no interest appears to have been paid or demanded until proceedings were taken after the Rajah's death by the present plaintiffs to foreclose the property, under the eighth section of Regulation XVII of 1806.

The first question which arises (being the question upon which the High Court have decided the case in favour of the defendants) is whether the directions in that section have been fulfilled. The High Court held that there was no sufficient proof of notification made to the defendants of the petition of the plaintiffs claiming foreclosure, and, that being the question, it will be right to look at the terms of the eighth clause. The enactment is: "Whenever the receiver or holder of a deed of mortgage and conditional sale, such as is described in the preamble and preceding sections of this Regulation, may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall (after demanding payment from the borrower or his representative) apply for that purpose by a written petition, to be presented by himself or by one of the authorized vakeels of the Court to the Judge of the zillah or city in which the mortgaged land or other property may be situated. The Judge, on receiving such written application, shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it, and shall at the same time notify to him by a perwannah, under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive."

The condition of foreclosure required by that section is that the mortgagor should be furnished with copy of the petition, and should have a notification from the Judge, in order that he may within a year from the time of such notice redeem the

property; and in an action of this kind, which is brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that this condition has been complied with.

It has been contended on the part of the appellant that it is within the province of the Judge of the Zillah Court to determine whether the notice has been duly served or not, and, although it has not been urged, or only very faintly urged, that his finding would be conclusive on the point, it has been strongly insisted that a finding of the Judge, recorded by him in the proceedings upon the foreclosure petition, would, at the least, be *primâ facie* evidence of the fact of service.

The general nature of the proceedings under the above Regulation was succinctly stated in a judgment of this Committee, in which it was pointed out that the functions of the Judge under s. 8 are purely ministerial—*Forbes* v. *Ameeroonissa Begum* (1).

Their Lordships, considering that the duties of the Zillah Judge in the matter of a foreclosure are of a ministerial nature, considering the vast importance to mortgagors of the notification, and the consequences which follow, if they do not redeem within the prescribed time, are of opinion that the service of it should be established by evidence in a suit like the present, which is brought, in fact, to enforce the foreclosure. The proceedings of the Judge are *ex parte;* and even if the Judge examined the Nazir or person who served the notice, it would be unsatisfactory that the estate of the mortgagor should depend upon his opinion. The argument indeed was not pressed that it would be conclusive, but it would be going far to say that it is of such authority as to be *primâ facie* evidence, which should shift the onus of proof upon such an important point, and relieve the mortgagee from giving affirmative proof of the due performance of a condition necessary to be established before the foreclosure can attach upon the estate.

In the present instance, however, the case shows that the Judge had no proof, properly so called, of the service. It is plain from the manner in which the entry of the service, is made

(1) 10 Moo. I. A., 340—350.

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that nothing more occurred than this, that the Nazir having received the perwannah, made a return, as it is called, on the back of it, stating what he had done with it. The substance of the return is stated in the proceedings of the Judge. After recording that "notices and copies of the petition for foreclosure of mortgage addressed to the opposite party, dated the 27th of February 1866 A.D., were delivered to the Nazir under a perwannah to serve on the opposite party," it goes on, "thereupon the Nazir submitted a return on the back of the perwannah to the effect that he could not meet the opposite party, and that he had stuck up a copy of the notice and of the petition on the houses of each of the opposite party, along with two receipts in the Hindi character, severally dated 13th and 14th Chyet, 1273 F.S., written by Bunsi Chowkidar and Bochal Chamar 'Poneas,' inhabitants of Mouzah Bhawanipore Ruhta, and Choonni Chowkidar and Numoge Chamar 'Poneas,' inhabitants of Mouzah Khoksisyam, Pergunnah Nesingpore Koora, which were annexed to the record." Then it goes on, "To-day the record of the case was brought up, and on a reference to the return submitted by the Nazir it appeared that the notice has been duly served." Therefore we have on the face of this document what the Judge considered to be proof of the notice, namely, the return of the Nazir, which is a mere statement of that officer, without apparently any verification upon oath, or any examination of the Nazir by the Judge.

Upon the trial, no proof whatever was given by the plaintiffs of the service of the notification. They appear to have relied on the recorded return of the Nazir. But it was contended that the want of proof is immaterial, in consequence of certain admissions contained in two petitions filed on the part of the mortgagors, the Dasses. One is a petition signed by five, and the other by six. They were originally 19 in number, and the remainder do not appear to have petitioned or to have made any admission. The first petition refers in this way, and in this way only, to the service: "The applicants caused a notice under Regulation XVII 1806 to be issued on the 27th February 1866, clandestinely served without the knowledge and information of your petitioners. Now your petitioners having

come to the knowledge of the case from some out-of-the-way sources, offer objections on the following grounds." This petition appears to have been presented a short time only before the end of the year of grace, and contains no admission of the time or sufficiency of the service. Their Lordships, therefore, consider that it does not amount to an admission that the notice had been properly served upon them at the time at which the mortgagee alleges it to have been, or that they had knowledge of it at a time which would have justified the foreclosure.

The other petition no doubt does contain an admission. There is this statement it it: "The petitioners have under a deed of conditional sale, dated the 9th Aughan 1266 F. S., for Rs. 5,000, had notice under Regulation XVII of 1806, in respect of 5 annas 3 gundas 1 cowrie 1 krant of Mouzah Dooram Mudehpoora, Pergunnah Nesingpore Koora, Zillah Bhagulpore, issued to us. Therefore we beg to submit our objections." It is true they do not in terms admit the time at which they had notice, but with regard to those petitioners a Judge would not be wrong in holding that there was an admission by them of due service. But this petition is the petition of six only out of the 19 mortgagors.

The importance of requiring proof of the service of the notice and not trusting to a bare statement that notice had been duly served is enhanced by the consideration that it has been held by a decision of the Full Bench of the High Court of Bengal that the year during which the mortgagor may redeem his property runs, not from the date of the perwannah or the issuing of it by the Judge, but from the time of service—*Mahesh Chundra Sen* v. *Tarinee* (1). This decision overruled some cases in the late Sudder Courts. in which it had been held that the year was to run from the date of the notification. Their Lordships are quite prepared to adopt the decision of the High Court. It is obvious that if the year is to run from the date of the perwannah, the negligence of the Nazir, or other circumstances, may prevent its service for a considerable time after its date, and so the mortgagor would loss the benefit of the full time which it was intended by the Regulation to give him.

(1) 1 B. L. R., F. B., 14; S. C., 10 W. R., F. B., 27.

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The necessity of proving service of the notice has recently been decided by two Courts in India, one a Division Court of the High Court of Bengal, and another a Division Court of the North-Western Provinces. In both it has been held that the service should be proved in the action which is brought to enforce the foreclosure. See *Syud Eusuf Ali Khan* v. *Mussamat Azumtoonissa* (1) and *Madho Singh* v. *Mahtab Singh* (2).

What their Lordships have held with regard to the service of the notice would be sufficient to dispose of the case against the appellants, but for the fact, to which allusion has already been made, of the admission by some of the defendants that they had received the notice. This opens the question whether the foreclosure is complete as against all or any of the mortgagors. The High Court has held that the omission to serve any one of the mortgagors would be fatal to the validity of the foreclosure. Their Lordships think that, in the circumstances of this case, service upon those only of the mortgagors whose petition admitted service, would be insufficient to warrant the foreclosure of the whole property or of any of it.

This is a mortgage for one entire sum, and the property, although held in certain shares, was mortgaged as a whole to the extent of five annas and a fraction, and was redeemable only upon payment of the entire sum. Each and every one of the mortgagors was interested in the payment of that money and the redemption of the estate, and each and every one of them had a right by payment of the money to redeem the estate, seeking his contribution from the others. The equity of redemption of those who were not summoned, and who had no notice that the mortgagee was demanding his money, cannot be foreclosed, because those who have been served have omitted to redeem. It is impossible for the mortgagee to obtain a foreclosure of the whole of the estate upon a service on some only of the mortgagors. Then with respect to the mortgagors who have admitted notice, it is to be observed that it was not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate, as upon one mortgage, one debt, and one entire right against all.

(1) W. R., 1864, Gap No., 49. (2) 3 All. H. C. R., 323.

Further, the Mundurs, the defendants of the second class, purchased some share of some of the Dasses before the foreclosure proceeding took place. It appears that in February 1861, two or three years after the conditional sale, and before the notice of foreclosure, two gundas and two cowries were sold to the Mundurs. It is said that they did not take possession, but they had become by this purchase the owners of the equity of redemption of the purchase shares, and notice of foreclosure ought to have been served upon them. Mr. Doyne has argued that a purchaser who has not taken possession need not be served. Their Lordships, however, think that that argument cannot be sustained. The mortgagee, when he seeks to foreclose, must discover and serve the persons who are the then owners of the estate.

A question of this sort came before this tribunal in the case of *Mohun Lall Sookool* v. *Goluck Chunder Dutt* (1). Their Lordships say upon it: "It is quite clear upon the authorities that if the sale had taken place before the notice of foreclosure was filed, that notice, to be effectual, must have been served on the purchaser, and in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon anyone except the widow and heiress of the original mortgagor."

There are subsequent cases in India which show that the view taken by their Lordships has been followed in practice.

Without saying that there may not be cases of mortgages of separate shares, in which, by proceedings properly framed, foreclosure may take place in respect of some such shares only, their Lordships think the proceedings in this case are not such as will sustain the present action as against any of the defendants.

What their Lordships have said is enough to dispose of this case, but they think it right to advert to the main question which arose upon the merits, whether this conditional sale was intended between the parties to be really operative as a *bonâ fide* instrument.

It seems that Rajah Tek Narain was a patron of the family of the Dasses. They were involved in debt, and he probably

(1) 10 Moo. I. A., 1, p. 14.

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advanced money to them from time to time. But with regard to this particular instrument there is strong evidence, arising from the history of the case and from facts which are beyond dispute, for presuming that it was not intended to be acted upon by Rajah Tek Narain. The deed is dated the 30th November 1858. In its terms it provides for immediate possession. A question, indeed, was raised whether that was so. It was said that the construction was at the least doubtful, and that it was not intended that the Rajah should have possession until the two years mentioned in the deed for the payment of the money had elapsed. However this may be, possession was not taken. No provision is made in the deed for payment of interest, and none was demanded. The two years given by the deed for the payment of the money expired on the 30th November 1860. The petition to foreclose was not filed until the 2nd of January 1866, and up to this date it is plain that the Rajah had not entered into possession, had received no interest, nor apparently had asked for any. He obtained what is called the order of foreclosure on the 14th September 1867. The note of the Judge that the foreclosure was "sanctioned" cannot indeed be properly regarded in the light of an order. He takes certain proceedings, and makes a record of them, but he can give no judgment in any way binding on the parties. However, the proceedings in his Court were complete on the 24th September 1867. Again no action is taken; possession is left where it was, no interest apparently is demanded, and this suit is not brought until the 1st of October 1872, nearly 14 years after the mortgage, and five years after the foreclosure proceedings came to an end.

Then the property is dealt with by the Rajah himself, in a manner which seems quite inconsistent with his having a deed of conditional sale which was intended to be acted upon. In 1861 a lease was granted by the Dasses to the Rajah (in the name of his servant Bijoy Dass) of six annas and certain fractions of annas of the same mouzah. Those annas must have included the whole of the shares which had been mortgaged—it appears to have included more; it is an ordinary lease, and part of the rent was to be deducted on account of a former zurpeshgi.

Again in 1867, after the Rajah's death, his sons obtained decrees against the Dasses, and the right and interest of the Dasses in this estate were notified for sale under those decrees. It appears that just before the days when the sale was to take place the Dasses sold their shares to the Mundurs, who alone appear here as respondents, obtained a large sum of money from them, and paid over that money in discharge of the judgment debt. Those circumstances are not referred to to show that the conditional sale did not exist, but they are inconsistent with its existence as a document which was intended to be acted upon. Throughout the above transactions there is no trace that it was referred to, or that any notice was given of it, or that anybody knew anything of it. Again, the Rajah, after the conditional sale, as admitted in the plaint, purchased some of the shares of the Dasses which had been mortgaged. They are sales as if the Dasses had the absolute ownership. The deeds in no way refer to the mortgage, nor was any provision made respecting the mortgage debt.

It is not necessary for their Lordships to go further into these transactions. They have adverted to them because they were desirous of expressing the opinion they entertain of the extreme doubt, to say the least, which rests upon the *bonâ fides* of the conditional sale. They do not desire to impute fraud to either the Rajah or the Dasses. The Rajah had probably taken this deed from them to act upon it in case he should think it right, but did not think it right to do so; and having kept it for so long a time without acting upon it, there is strong evidence in this and in the other circumstances of the case which have been adverted to, leading to the conclusion that it is not a *bonâ fide* conveyance as against *bonâ fide* purchasers, which the defendants, the Mundurs, are.

On the whole case, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the Court below, and to dismiss this appeal with costs.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondents: Messrs. *Barrow* and *Barton.*

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

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THE EMPRESS *v.* AMIRUDDEEN.*

Penal Code, ss. 217, 218—*Evidence that Offence has been committed.*

It is sufficient for the purpose of a conviction under s. 217 of the Penal Code that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment; it is not necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment.

THE charges against the prisoner, who was a police constable were that he, when in charge of the Gourruddey Police Station, on the 28th of July, in his capacity of head constable of police, induced one Radha Churn Dhopa to compromise a complaint, which he came to make against one Adhari Dhopa,† of cutting off his ear, and, in further violation of his duty, suppressed the fact that Radha Churn Dhopa came to make a complaint; and in so doing framed an incorrect public record with a view to save one Adhari Dhopa from legal punishment. The prisoner Amiruddeen was committed for trial under ss. 217 and 218 of the Penal Code, and, on conviction under these sections, was sentenced to imprisonment and fine. He appealed to the High Court.

MR. *M. M. Ghose* for the appellant.

The judgment of the Court was delivered by

JACKSON, J.—It has been pressed upon us in this appeal that the prisoner has not been duly convicted under s. 217 of the Indian Penal Code, because there was not before the Court upon the present trial any evidence to show that in point of

* Criminal Appeal, No. 34 of 1878, against the order of H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 17th November 1877.

† Adhari Dhopa was charged before the Sessions Court with the murder of Radha Churn, who died from the wound in his ear, and was acquitted.

fact an offence had been committed, still less that such offence had been committed by the person in respect of whom the wrongful act of the Police officer, the prisoner, had been done. What appears is, that a person named Adhari Dhopa was charged before the Court of Session, and was tried and acquitted, of an offence, the offence charged being the cutting off somebody's ear; and it appears that the particular act which the prisoner in this case had committed, and which amounted to knowingly disobeying a certain direction of the law as to his conduct as a public servant, had a tendency to save a person, namely, the person charged, as first stated, from legal punishment. It appears to me quite sufficient, for the purpose of a conviction under s. 217, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he should have done this with the intention of saving a person from legal punishment, and that it is not further necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment. It appears to me certain that a public servant charged under that section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded upon a mistaken belief as to that person's liability to punishment. We have been pressed with a case in which I myself gave judgment—the case of *Queen* v. *Joynarain Patro* (1). It is not necessary for us at present to consider whether that judgment was right, because the section on which that case turned was wholly different from the section now under consideration. That is a section under which any member of the community is punishable, and it is one under which the essence of the offence is that the person to be dealt with must know, or have reason to believe, that an offence has been committed. This is an offence applying only to public servants, and an act of a certain kind is made punishable as an offence when such act is done knowingly against the direction of the law and with the intention of saving a person from legal punishment, whether

(1) 20 W. R, Cr. Rul., 66.

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the person so intended to be saved from punishment had committed the offence or not.

I think, therefore, that the conviction in this case was right, and that the appeal must be dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice L S. Jackson and Mr Justice Cunningham.

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NILKUNTO DEY (ONE OF THE DEFENDANTS) *v* HURRO SOONDEREE DOSSEE (PLAINTIFF).*

Mode of Attachment in Execution of Decree—Malikana Rights payable for ever—Act VIII of 1859, *ss.* 235, 236, 237.

A and *B* were entitled to receive annually and for ever a specified amount by way of malikana rights from the Collector as compensation for their extinguished rights in lakhiraj lands In execution of a decree, *C*, on 13th September, purported to attach, under s. 237 of Act VIII of 1859, *A*'s share in such specified amount. Subsequent to this attachment, namely, on 23rd September 1873, *A* and *B* mortgaged their rights to the plaintiff. In a suit brought by him against *A* and *B* and *C*,—*held*, that attachment under s 237 was not applicable to a right to receive money for ever, that such an attachment is only good so far as it relates to any specific amount, which may be set forth in the request to the officer in whose hands the moneys are, as being then payable or likely to become payable, and that the attachment in question was therefore invalid

Semble —The attaching-creditor should have proceeded under s 235 or s 236. In either of such cases the defendant, the person to whom the money was payable, would be entitled to notice that he was not at liberty to alienate his rights.

THIS was a suit brought against three defendants to recover a sum of money due by the defendants Nos. 1 and 2 under a mortgage dated 9th Assin 1281 (23rd September 1873). The plaintiff charged defendant No. 3 with having purchased part of the mortgaged property in execution of a money decree obtained by him against defendants Nos 1 and 2. Defendant No. 3, in his written statement, admitted the attachment of the property

* Special Appeal, No 690 of 1877, against the decree of L R Tottenham, Esq, Judge of Zilla Midnapore, dated the 19th March, 1877, modifying the decree of Babu Debendro Lal Shome, Sudder Munsif of that district, dated 5th January 1877.

on 13th September 1873 in execution of his decree, and subsequent auction-sale at which he himself had purchased the property in dispute, but denied all knowledge of the plaintiff's mortgage, and asserted that this auction-purchased property was in no way liable for it. The property mortgaged would appear to have been certain malikana rights which the defendants Nos. 1 and 2 had to receive annually for ever, in a specified amount, from the Collector as compensation for their extinguished rights in lakhiraj lands. It would also appear that a quarter share of this specified amount payable to defendant No. 1 had been attached by defendant No. 3 in execution of his decree on 13th September 1873 and prior to the plaintiff's mortgage. The attachment was made under the provisions of s. 237 of Act VIII of 1859, and the Court of first instance, being of opinion that the specified amount or malikana rights were money in the hands of a Government officer, held the attachment to be good. The lower Appellate Court reversed this decision, the learned Judge considering that the property attached was a sort of interest on land or immoveable property; that the right to receive it for ever was something more than money in the hands of the Collector; and that a mere notice under s. 237 to the Collector without any further notice to the debtor or the public could not, under s. 240, render any alienation of the right to receive the pension or malikana null and void. He also held that the auction-purchaser bought an encumbered property, and that he must either pay the encumbrance or submit to have it sold.

Defendant No. 3 now appealed to the High Court.

Baboos *Srinath Doss* and *Mohini Mohun Roy* for the appellant.

Baboos *Mohesh Chunder Chowdhry*, *Hem Chunder Bonnerjee*, and *Porna Kalee Mookerjee* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—The question which we have to determine in this case relates to the sufficiency or insufficiency of an attach-

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ment which the defendant, special appellant, had effected, and in respect of which he seeks to invalidate a mortgage set up by the plaintiff of certain rights which the other defendants, Nos. 1 and 2, had to receive in a specified amount from the Collector annually as compensation for their extinguished rights to certain lakhiraj land. The attachment was made under s. 237 of the repealed Code of Civil Procedure, and if that attachment was sufficient, then by s. 240 the mortgage made during the attachment was invalid, and the purchaser at the execution-sale would have acquired a right to receive such money free of any such mortgage. It is contended that it is an attachment duly made under s. 237, inasmuch as the property consisted of money in the hands of an officer of Government, which was or might become payable to the defendant or on his behalf, and that in such a case all that need be done for the purpose of attaching the property is to make a request to the officer in whose hands the money is that the money may be held subject to the further order of the Court. It seems to me clear that an attachment of that kind is only good so far as it relates to any specific amount which may be set forth in the request as being then payable or likely to become payable to the defendant, and that that mode of attachment is not applicable to a right to receive money for ever, such as is in question in the present case. It may be doubtful whether, in the circumstances of this case, the attaching-creditor ought to have proceeded under s. 235 or under s. 236 of the Code. In either of these cases the defendant, the person to whom the money was payable, would be entitled to a notice, and it seems to me clear that this was a case in which the debtor ought to have had a notice that he was not at liberty to alienate his rights. All that we need decide, however, is whether s. 237 will govern the attachment of a right to receive money for ever. It appears to me that it will not. The decision of the Judge is, therefore, correct, and the special appeal must be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

RALLI AND ANOTHER (DEFENDANTS) *v.* FLEMING AND ANOTHER (PLAINTIFFS).

1878 *Feb.* 6, 12, 13, 14, *and March* 12.

Trade-Mark—Right to Injunction to restrain use of Trade-Marks—Combination of Figures.

The plaintiffs, from 1872, imported and sold an article described as 7½lbs. grey shirtings, and marked as follows: "In the centre of each piece of cloth a stamp in blue colour of a turtle in a star, with the words 'trade-mark;' underneath, in a semi-circular form, is the name 'Fleming, Galbraith, & Co., Manchester,' and under this the number 39 within a star, and at the bottom of each piece the number 2008." In 1877 the plaintiffs discovered that the defendants were importing from the same manufacturers, and selling cloth of a similar quality marked as follows: "A stamp in blue colour of a rose in a square; underneath are the words 'Ralli and Mavrojani' arranged in a semi-circular form, and under this the number 39 in a star, and at the bottom the number 2008." On the facts of the case the lower Court (MACPHERSON, J.) granted an *interim* injunction to restrain the defendants from so marking their cloth, on the ground that it was a colourable imitation of the plaintiffs' mark and calculated to mislead the public; and on appeal the Court (GARTH, C.J., and MARKBY, J.,) upheld that decision so far as to continue the injunction.

Held per GARTH, C. J.—If the imitation of the plaintiffs' marks generally, or the use of the number 2008 in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation. Under the circumstances the use of their marks by the defendants would be calculated to deceive the public into the belief that they were purchasing goods imported by the plaintiffs.

Per MARKBY, J.—The number 2008 was not part of the plaintiffs' trade-mark proper: nor on the evidence was it so associated with the plaintiffs' name as to indicate to the public that the goods bearing that number came only from the plaintiffs' firm as importers: on the evidence it was merely a quality mark, and therefore not calculated to mislead the public into the belief that they were purchasing the plaintiffs' goods, while in fact they were purchasing those imported by the defendants.

Semble.—There may be a right to exclusive use of a trade-mark by traders who are importers only.

APPEAL from an order of Macpherson, J., dated the 14th of September 1877.

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The suit was brought for an injunction to restrain the defendants from using the plaintiffs' trade-mark. The plaint stated that, in 1872, the plaintiffs commenced to import a certain description of cloth known in the trade as 7½lbs. grey shirtings and by the number 2008; and in order particularly to distinguish the said cloth, the plaintiffs, in 1872, adopted a trade-mark described as follows: "In the centre of each piece of cloth is a stamp in blue colour of a turtle in a star with the words 'trade-mark;' immediately underneath is the name 'Fleming, Galbraith, & Co., Manchester;' and under this is the number 39 (meaning 39 yards in length) within a star, and at the bottom of each piece is the number '2008';" that this combination of symbols, words, and figures was so well known and recognized in the market as the trade-mark of the plaintiffs that until the defendants did so, no persons other than the plaintiffs had, so far as the plaintiffs were aware, ever impressed on cloth any mark resembling that of the plaintiffs,' and that the laintiffs had become entitled to the exclusive use of the said trade-mark for the purpose of distinguishing the cloth sold by them; that the cloth bearing the said trade-mark was known in the market as No. 2008,' and by the native dealers as '*do hazar ât*,' and had acquired celebrity, and was recognized and known as cloth imported by the plaintiffs and to be of a superior quality; that from 1875 to 1876, one Bholanath Khettry was in the plaintiffs' employ as a piece-goods broker, who acted also for the defendant's firm as broker, and the plaintiffs alleged that when he left them he remained in the employ of the defendants, and induced them to imitate the trade-mark of the plaintiffs and cloth known as '2008,' which Bholanath Khettry knew would find a ready sale; that, in July 1877, the plaintiffs learnt for the first time that the defendants were importing and selling cloth known as 7½lbs. grey shirtings impressed with the following words, symbols, and numbers, which the plaintiffs alleged differed only colorably from their trade-mark: "A stamp in blue colour of a rose in a square; immediately underneath are the words 'Ralli and Mavrojani' arranged in the same semi-circular form as the words 'Fleming, Galbraith, & Co., Manchester,' are arranged in the plaintiffs' trade-mark; under

these words is the number 39 in a star similar to that used in the plaintiffs' trade-mark, and at the bottom is the number '2008';" that up to a very recent period the defendants had been selling similar cloth but with a different number,—namely, '177' instead of '2008,' and the character of the figures was dissimilar, and the words 'Ralli, Mavrojani' were there printed in a different style of lettering to that now adopted, which was the same as the plaintiffs.' The plaintiffs alleged, by the use of the said mark impressed on the goods imported by the defendants, the defendants were enabled to pass off such goods to retail purchasers as goods imported by the plaintiffs, and that the use of the said mark was calculated to deceive, and had deceived, the purchasers of the goods imported by the defendants into the belief that such goods were in fact goods imported by the plaintiffs.

The defendants in their written statement denied that the plaintiffs were in any way entitled to the exclusive use of the number '2008' either alone or in combination with the marks or symbols described in the plaint; and also denied that such number was known or recognized in the Calcutta market as indicating that the goods bearing it were imported by the plaintiffs; and they stated that, from the establishment of their business in 1851, they had adopted and used as their trade-mark on goods imported by them a ticket and stamp, the ticket of rectangular and oblong form, green in colour, and bearing the device of a rose with the name of the defendants' firm in English and Greek characters, and the words '39 yards, Manchester;' and the stamp rectangular in form of a blue colour, and bearing the same device as the ticket, but on a larger scale and containing the name of the defendants' firm in English, Greek, Bengali, Nagri, and Devanagri characters, and that their trade-mark was well known to the native buyers of piece-goods in Calcutta as the '*puther* mark' or Ralli, Mavrojani's 2008, while that of the plaintiffs' was known as the '*cuchooa* mark,' or Nicol, Fleming's 2008; that the number 2008 was regarded by buyers as a mark indicating quality, and not as indicating the person or firm importing the goods; that the plaintiffs were not the manufacturers of the grey shirtings, but only importers, and had no

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exclusive right to import such goods; that they were informed by Bholanath Khettry that he had been applied to by dealers for shirtings of the same manufacture as those sold by the plaintiffs under their '*cuchooa* mark' and bearing the number 2008, and thereupon ordered through their Manchester firm a quantity of such cloth, and their Manchester firm purchased it from the same manufacturers in Manchester from whom the plaintiffs purchased their cloth and sent it out to Calcutta; it was of precisely the same quality and texture as that imported by the plaintiffs, and in order to distinguish it, the defendants affixed their own trade-mark and name together with the number 2008, and it was known in the market as 'Ralli, Mavrojani's 2008.' The defendants further stated that they had not sold the same cloth with a different number as alleged in the plaint; nor had they imitated the plaintiffs' trade-mark, or by the marks they did use had they deceived purchasers as alleged.

MACPHERSON, J.—It seems to me that the order ought to be granted, and the rule made absolute on the affidavits. It is clear on the face of the defendants' own affidavit that the 2008 is used to induce native dealers to believe that they are receiving the identical articles sold by Nicol, Fleming, & Co. So far as any desire to show it is of the same quality, that can be effected by using the '2008' in different figures; but the figures are copied in every particular. I have no doubt the object is to induce the dealers to believe that they are buying the very same cloth, and that the object is to deceive. The rule will, therefore, be made absolute, and the injunction will go.

The injunction was one in terms of the prayer of the plaint, restraining the defendants, their servants and agents, until the further order of this Court, from importing and selling the description of cloth known as 7½lbs. grey shirtings, or any other cloth or goods impressed with a stamp in blue colour of a rose in a square with the words 'Ralli and Mavrojani, Manchester,' underneath, arranged as the words 'Fleming, Galbraith, & Co., Manchester, are arranged in the plaintiff's trade-mark, and having underneath these words the number '39' within a star, and at

the bottom the number '2008,' and from importing and selling such cloth impressed with any mark being an imitation of a similar or only colorably different from the plaintiffs' trade-mark.

The defendants appealed, on the grounds that no sufficient evidence of their exclusive right to use the number 2008 had been given by the plaintiffs; that they had failed to prove that the use by the defendants of the number 2008 with their own trade-mark had deceived or was calculated to deceive persons into the belief that, in purchasing the goods imported by the defendants, and bearing the defendants' trade-mark and the number 2008, that they were purchasing the goods imported by the plaintiffs; but on the contrary, the evidence given on behalf of the defendants showed it was not calculated so to deceive purchasers; that the injunction, if granted at all, ought to have been limited to restraining the defendants from using the number 2008 on 7½lbs. grey shirtings; and that it ought not to have been granted without putting the plaintiffs on terms of undertaking to make good to the defendants the amount of any damages which the issuing of the injunction might cause them in the event of the plaintiffs' suit being dismissed.

The *Advocate-General* (Mr. *Paul*), Mr. *J. D. Bell*, and Mr. *Bonnerjee* for the appellants.

Mr. *Jackson*, Mr. *Phillips*, and Mr. *Evans* for the respondents.

The following cases and authorities were cited:

For the appellants: *Farina* v. *Silverlock* (1), *Blackwell* v. *Crabb* (2), *Woollam* v. *Ratcliff* (3), *Wheeler & Wilson Manufacturing Co.* v. *Shakespear* (4), Adams on Trade-marks, p. 17, *Perry* v. *Truefitt* (5), *Braham* v. *Bustard* (6), *Kinahan* v. *Botton* (7), *In re Mitchill's Trade-Mark* (8), *Ford* v. *Foster* (9), *Ainsworth* v. *Walmsley* (10), *Burgess* v. *Burgess* (11), *Blanchard*

(1) 6 De Gex. M & G, 214.
(2) 36 L J., Ch, 504
(3) 1 Hem. & M, 259
(4) 39 L. J, Ch., 36.
(5) 6 Beav., 66, 418.
(6) 1 Hem & M, 447
(7) 15 Ir Ch, 75.
(8) 46 L. J, Ch, 876.
(9) L R, 7 Ch. Ap, 611.
(10) L R, 1 Eq, 518.
(11) 22 L J, Ch, 675.

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v. *Hill* (1), *Ragget* v. *Findlater* (2), *Motley* v. *Downman* (3), *Bacon* v. *Jones* (4), *Welch* v. *Knott* (5), *Batty* v. *Hill* (6), *Singer Manufacturing Co.* v. *Wilson* (7), and *Cheavin* v. *Walker* (8).

For the respondents: *McAndrew* v. *Basset* (9), *Seixo* v. *Provezende* (10), *Ainsworth* v. *Walmsley* (11), *Ragget* v. *Findlater* (2), *Singer Manufacturing Co.* v. *Wilson* (7), *Wotherspoon* v. *Currie* (12), *The Leather Cloth Company* v. *The American Leather Cloth Company* (13), *Hall* v. *Barrows* (14), *Chappell* v. *Davidson* (15), *Sykes* v. *Sykes* (16), *Ford* v. *Foster* (17), *Croft* v. *Day* (18), *Franks* v. *Weaver* (19), and *In re Barrew's Trade-Marks* (20).

In reply :—*Colonial Life Assurance Co.* v. *Home and Colonial Life Assurance Co.* (21), *Lee* v. *Haley* (22), *Cory* v. *Yarmouth and Norwich Railway Co.* (23), and *Harrison* v. *Taylor* (24).

The following judgments were delivered:—

GARTH, C.J.—I am of opinion that this injunction was properly granted; but in order to make its meaning more clear, I think the form of it should be slightly modified.

There is no doubt, I conceive as to the law of the case; and there is but little difference between the parties as to the actual facts. The difficulty, if there be any, is to ascertain the fair and reasonable inference which we ought to draw from those facts. I propose dealing with the matter at this stage as shortly as I can, in order to avoid prejudicing the defendants' case at the hearing

(1) 2 Atk., 484.
(2) L. R., 17 Eq., 29.
(3) 3 Myl. & Cr., 1.
(4) 4 Myl. & Cr., 433.
(5) 4 Kay. & J., 747.
(6) 1 Hem. & M., 264.
(7) L. R., 2 Ch D., 434.
(8) L. R., 5 Ch. D., 850.
(9) 33 L. J., Ch., 561.
(10) L. R., 1 Ch., 192.
(11) L. R., 1 Eq., 518.
(12) L. R, 5 H. L., 508.
(13) 33 L. J., Ch., 199; S. C., 11 H. L. C., 523, at p. 538.
(14) 33 L. J., Ch., 204.
(15) 2 Kay. & J., 123.
(16) 3 B. & C., 541.
(17) L, R., 7 Ch. Ap., 611.
(18) 7 Beav., 85.
(19) 10 Beav., 297.
(20) L. R., 5 Ch. D., 353.
(21) 30 Beav., 548.
(22) 39 L. J., Ch., 284.
(23) 3 Hare, 593.
(24) 11 Jur, N. S., 408.

of the cause, when the Court may probably be supplied with fuller materials than it has at present for ascertaining the truth.

For the present purpose it appears to me sufficiently established that the plaintiffs, Messrs. Nicol, Fleming, & Co., have, for several years past, been selling a particular cloth in the market, which has obtained celebrity there, and become readily saleable; that this cloth is known to the public by certain marks which are described conspicuously upon it, and especially by the number '2008,' which is printed upon each piece in large figures, and in a particular position and combination; and that the defendants, Messrs. Ralli and Mavrojani, having imported similar cloth obtained from the same manufactory, have had marks impressed upon their cloth in a combination generally resembling that used by the plaintiffs, and especially introducing in a similar position and in figures of the same size and character the number '2008,' avowedly for the purpose of giving their cloth a saleable quality in the market, which it would not otherwise possess. Thus far there is no difference between the parties as to the facts.

The defendants say that the plaintiffs are entitled to no monopoly of the sale of cloth in question; that they are not manufacturers of it; and that they, the defendants, have as much right to obtain it from the manufacturers, and sell any quantity of it in the market as the plaintiffs have. This is, of course, perfectly true. But the question is, whether, for the purpose of giving the cloth a saleable quality, the defendants have a right to use these marks which undoubtedly are in some essential particulars an imitation of marks which have hitherto been used exclusively by the plaintiffs? The defendants say that they have not adopted either the plaintiff's *name* or their *trade-mark* proper, which is a turtle; that they describe on the cloth their own name and trade-mark, which is a rose. They admit that they use the number '39' in the same configuration, and for the same purpose as the plaintiffs use it, viz., to denote that each piece of cloth is 39 yards in length; and they claim a right to use the number '2008' as merely conveying to the public that the cloth which they sell is of the same quality as the plaintiffs'.

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The plaintiffs, on the other hand, say, that this combination of marks, although differing from theirs in some respects, is undoubtedly a close imitation of it; and that by using this combination, and more especially by the use of the number '2008,' which is admitted to be the main descriptive feature which renders the cloth saleable, the defendants would lead the public to believe that the goods which they are selling are goods imported or sold by the plaintiffs' house. This is the real pith of the case; and here it is that the Court is called upon to draw a fair and reasonable inference from the facts. If the defendants' combination is so different from the plaintiffs, that the public could not reasonably be deceived by the use of it, or if the number '2008' was merely a manufacturer's number, or was used generally by the trade to designate a particular kind or quality of cloth, no doubt the defendants would have as much right to use either the combination or the number as the plaintiffs.

But, on the other hand, if the object of the defendants in using this number and in imitating the plaintiffs' combination is, or if the natural consequence of their doing so would be, to induce the public to believe that the goods which they sell were imported by, or came from the plaintiffs' house, then I consider that, in point of law, *the defendants would not be justified in thus deceiving the public to the plaintiffs' prejudice.*

Now, in determining this question, I think we ought to consider in the first place, how it was that the defendants came to use these marks at all; and in the next place, who and what the buyers of these goods are, and how and by what considerations they are likely to be influenced.

First, then, the evidence in the case explains very clearly to my mind how it was that the defendants came to use these marks. From the 7th paragraph of the affidavit of Mr. Westerhout, the plaintiffs' assistant, and the affidavit of Bholanath Khettry, the broker, which he made on behalf of the defendants, it appears that, in the years 1875 and 1876, Bholanath was employed by the plaintiffs to sell this cloth for their house. He well knew the estimation in which it was held in the market; he knew that it was saleable only by marks used by the plaintiffs; and when

he left the plaintiffs, and began to act as broker to the defendants, he was asked in the market for these same goods which he had been selling previously for the plaintiffs and *as their goods;* and he then advised the defendants to buy similar cloth from the manufacturers, and to have it marked in their own way. It is clear to me that it was through this man's advice, though he does not actually say so, that the defendants had the number '2008' printed on their goods, and that their combination of symbols was made in such a form as to imitate that of the plaintiffs'.

It must here be borne in mind, and it is, in my opinion, a most material feature in the case, that the number '2008' was a symbol *used exclusively by the plaintiffs and impressed only upon goods which came from their house.* It was not a manufacturer's number: it was a symbol, the use and meaning of which was not known to the defendants, and is not now known to the Court. It was known to the plaintiffs only. The defendants chose to say that they understood it to notify the quality of the cloth, and they say this because other cloths of different qualities sold by the plaintiffs are marked '2006' and '2007:' but this is a mere conjecture on their part; and they do not profess to understand, nor can they in fact know, the true origin or meaning of that symbol. If they had used the words,—'1st quality' or '2nd quality,' or such an expression as 'superior' or 'superfine,' or 'super-durable,' they would have used terms which are intelligible to all the world, and the use of which could not be calculated to deceive. But the number '2008' is a peculiar symbol which, like a 'lion' or a 'tree,' or a 'flower,' would convey a particular meaning to the plaintiffs themselves, but to no one else, and which could only have been used by the defendants, *because it had been used by the plaintiffs in the sale of this cloth.* Now then, let us see, secondly, who were the buyers of these goods in the market, and what considerations influenced, or were likely to influence, them in making their purchases? The buyers and consumers of this class of goods would be, for the most part, the native public—people who, as a rule, cannot read or write English; who would scarcely distinguish the name of 'Nicol, Fleming & Co.' from that of 'Ralli and Mavrojani,' and who certainly could not understand, even if they could read the

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word 'trade-mark.' They might possibly, if they examined the print carefully, distinguish between a rose and a turtle; but what they would naturally most be guided by is the general appearance of the combination described on the cloth; and it is admitted, according to the evidence on both sides, that the most distinctive mark in that combination was the conspicuous number 2008 by which name '*do hazar ât*,' the cloth itself was known in the market.

From these considerations it appears to me that the fair and almost necessary inference to be drawn is this:—that as the plaintiffs, for a period of five years, had been the only persons selling this cloth in the market by these distinctive marks, and as, during that time, the cloth had obtained peculiar value and celebrity in the eyes of the public, who had learnt to place faith in the goods so marked and sold by the plaintiffs, the use of these marks upon similar cloth by the defendants would be calculated to deceive the public into the belief that the goods which they were buying were the goods which they had bought for years before *imported and sold by the plaintiffs;* or, in other words, would naturally lead them to suppose that they were buying goods which came from the plaintiffs' house.

In coming to this conclusion I do not think it necessary in this particular case to go narrowly into the question, whether the whole, or any, and if so what, particular part of the plaintiffs' combination is to be considered as their '*trade-mark proper.*' I think that, considering who and what the buyers of these goods are, they would understand very little of what was a '*trade-mark proper.*' I only say that if the imitation of the plaintiffs' marks generally, or of the use of the number '2008' in particular, would be calculated to deceive or mislead the public, the defendants ought to be restrained from such use or imitation.

It was urged upon us in argument by the defendant's Counsel, that, by confirming the judgment of the Court below, we should be imputing direct fraud to a firm of respectable merchants, and exposing them to obloquy and odium in the commercial world, before the cause itself had been finally determined; and we were therefore, much pressed to dissolve the injunction, and merely to

require the defendants to keep an account of their sales until the hearing But I confess it seems to me that, in using this argument, the learned Counsel have done their clients an injustice. I have no reason to suppose that, in using these marks, the defendants knew that they were committing a fraud, or doing the plaintiffs any actionable wrong. I dare say these gentlemen may have carefully considered,—nay, I think it not impossible that they may have taken advise,—as to how far they might use these marks without infringing in any way upon the rights of other people. But they have done what many honest and good men have, under similar circumstances, done before them,—*they have made a mistake* without any evil intention; and this Court is bound to prevent them until the rights of the parties have been finally ascertained at the hearing from repeating it.

In this particular case I do not think that their keeping an account of sales would be a sufficient protection to the plaintiffs. because if the defendants were allowed to use these marks in the market for several months in order to sell their cloth, they would become as well known in the market as importers and sellers of the cloth as the plaintiffs; and so the very mischief which the injunction is intended to guard against would have been effected.

I think, therefore, that this appeal should be dismissed, and with costs on scale 2; but that the form of the injunction should be varied thus:—

Order, that the defendants be restrained from selling any cloth impressed with the combination of marks described in exhibit D, annexed to the affidavit of Alexander Westerhout, or any other combination resembling that used by the plaintiffs, and especially from using the number '2008' in any such combination.

MARKBY, J.—In this case I have had some doubt whether it is desirable to express my views at length, but upon the whole I have come to the conclusion that I ought to do so.

The plaintiffs and defendants are both merchants in Calcutta, and both are in the habit of importing largely goods known by the name of grey shirtings from Manchester, which they sell chiefly to native dealers in the bazar. These grey shirtings are delivered by the manufacturers to the correspondents of the

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parties at Manchester unmarked, and the outside fold of each piece is there marked by the correspondents of the firms here. There has been for some time a general similiarity between the marks in use by the plaintiffs and those in use by the defendants. The general character of the marks in use by both the firms is as follows:—at the top is a green paper ticket pasted on the cloth with a device thereon, and the name of the Manchester firm in English, and two or three native languages, well-known in the bazar; beneath this is a device similar to the device on the ticket impressed by a stamp upon the cloth itself; beneath this again the name of the Manchester firm in large English letters (which, in the case of the defendants, is the same as the name of their firm here); lower down the figures 39, being the number of yards in each piece, and lowest of all a number which generally signifies the quality of the cloth. About five years ago the plaintiffs began to sell grey shirtings, each piece of which was marked at the bottom with the number 2008. Sometimes in the year 1876 the defendants commenced selling grey shirtings bearing the same number. The plaintiffs thereupon complained that the defendants were infringing their trade-mark, and required them to desist. The defendants signified their willingness to make some alterations in the marking of their cloth, but insisted on retaining the number '2008.' The plaintiffs were not satisfied with this, and the present suit was accordingly brought. When the plaint was filed, the plaintiffs applied for, and obtained an interlocutory injunction, restraining the defendants from using their trade-mark, and it is against the order granting this injunction that the present appeal is brought.

I am not aware of any previous case relating to trade-marks as used by the traders who are importers only; but I see no reason why there should not be such a trade-mark. If the law declares, as it clearly does, that no man has a right to put off his goods as the goods of a rival manufacturer, it seems to me to follow that no man has a right to put off his goods as the goods of a rival importer. The confidence reposed in the skill, care, and honesty of a particular firm may give a special value to goods imported by them. The question is, did the defendants put off goods imported by themselves as goods imported by the plaintiffs?

There is no question here as to the quality of the goods sold by the defendants under this number, being the same in quality as the goods sold by the plaintiffs under that number. Nor is there any question of the right of the defendants to sell goods of this particular quality, which may be bought at Manchester by any one who chooses to pay for them.

The plaintiffs claim the whole of that which is impressed upon the outside of each piece of cloth as their trade-mark. How far they can do this I shall have to consider in dealing with another part of the case. Conceding for a moment that it would be possible for the plaintiffs to make out this claim, it seems to me to be clear upon the evidence that the only infringement of which they can complain is the use of the number '2008.' They have themselves produced a piece of cloth, with respect to which one of their own witnesses makes the following statement:—"That I am informed, and verily believe, that, up to a very recent date, the defendants have been selling similar cloth, but with a different number, namely '177,' instead of the number '2008' now adopted by them, the character of the figures being in themselves dissimilar; and that the words 'Ralli and Mavrojani' were then printed in a different style of lettering to what they have now adopted. A piece of cloth, bearing the above-mentioned number '177' and sold by the defendants *before they imitated the plaintiffs' trade-mark as hereinbefore mentioned, is hereunto* annexed and marked with the letter B. (see p. 10 of Mr. Westerhout's affidavit). If the piece of cloth here referred to be looked at, and the mark on it compared with that now in use by the plaintiffs, it will be seen that this statement really reduces this infringement to the substitution of the '2008' for No. 177.

The meaning which the plaintiffs attach to the figures '2008' has not been disclosed by them, but it is clear to me from these affidavits that, whatever meaning the plaintiffs may attach to these figures, they are treated by the public as a quality mark—whether as a quality mark of importation or as a quality mark of manufacture only, I shall consider hereafter. It is also clear that considerable value is attached to this mark as a mark of quality by buyers of this description of cloth. It is, more-

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over, not shown that any other firm in Calcutta imports cloth bearing this number except the plaintiffs, and (recently) the defendants; but the plaintiffs themselves import grey shirtings of a slightly different description bearing the Nos. 2007 and 2009.

As I understand the law upon this subject, no trader can complain against a rival trader in regard to any announcement he makes concerning the goods which he sells, so long as no statement is made which is untrue, or calculated to mislead. But besides making use of ordinary language and their own names, in order to announce to the public what they wish to make known with respect to their goods, traders are in the habit of resorting to a variety of devices in order to catch the eye of the public, and to represent to them in a striking manner what they wish to announce. Sometimes they wrap their goods in a fanciful cover, sometimes they impress upon their goods a fanciful name, at other times a fanciful plant or animal; and when a trader specially selects and appropriates to himself for the purpose of distinguishing his goods a device of this kind, that device becomes his trade-mark proper, and no one else is allowed to use it. But if, without any such special selection and appropriation, the goods of the trader do in fact happen to bear some particular mark, and this mark has come to be associated by the public with this trader's name, so that all goods bearing that mark are supposed to come from him, then also the law will not allow any person to use a mark of this latter description any more than it will allow him to use a rival trader's trade-mark proper, and for this reason, because in either case there is made, or there is assumed to be made, a representation to the public which is false, namely, that the goods which are the goods of one trader are the goods of another. But this distinction has been drawn between these two cases. If it be shown that a trader has infringed a rival trader's trade-mark proper,—that is to say, the mark which another trader has specially selected and appropriated for the purpose of distinguishing his goods,—the Court will, without further evidence, at once interfere, taking it for granted that such a proceeding is calculated to deceive the public; whereas, if the mark be one which has not been specially selected and appropriated by the trader

for this purpose, evidence must be given to show that the mark was so understood by the public as to make it clear that the proceeding had either deceived, or was at least calculated to deceive, the public. Marks of both these kinds are usually called trade-marks, and the distinction between the two cases is not one of principle, but it is one which is convenient when examining the evidence by which it is sought to prove the infringement

Now dealing with the question whether the figures '2008' were part of the plaintiffs' trade-mark proper. I think upon this evidence it appears that they were not. The plaintiffs themselves have, as I consider, told the public with sufficient accuracy what their trade-mark is, to enable us to say with certainty that these figures were no part of that device, which they themselves had specially selected and appropriated for the purpose of distinguishing their own goods from those of other trades.

It is, as is well known, a very common custom amongst traders, when they adopt a particular device in order to distinguish their goods, to announce to the world that they have done so by attaching to the impression of this device upon their goods the words 'trade-mark.' This is a notice to the public of what their trade-mark proper consists, and to other traders not to use it. Such a notice greatly assists the trader who has adopted the device in the appropriation of it to himself. But a trader who gives such a notice must, I think, be understood to confine his trade-mark proper to what is reasonably covered by the words. Now it appears that the plaintiffs have, in conformity with this custom, made an announcement to the world of what their trade-mark consists. Upon the piece of cloth produced by them and marked according to their present fashion, the word 'trade-mark' appears twice—once upon the stamp impressed upon the green paper pasted on to the cloth, and once upon the stamp impressed upon the cloth itself. In both cases the words are attached to the figure of a turtle in the centre of a star. I think it is quite clear, therefore, that what the plaintiffs have represented to the world as the device by which they designate their goods is this turtle in a star. What I think is the reasonable construction of the plaintiffs' own announcement, at any rate, I cannot, by any construction of these words, extend so as to cover the figures '2008.'

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The figures '2008' therefore not being any part of the plaintiffs' trade-mark proper, we have then to consider whether these figures have been so associated with the plaintiffs' name as to indicate, in the understanding of the public, that goods of this description bearing this number came from their firm, and whether the use of these figures by the defendants is calculated to deceive buyers of ordinary intelligence. This is the most favourable way of putting the question for the plaintiffs. I am not sure that it is not a little too favourable: but let that pass. Now, if I had to decide this case finally upon the evidence now before me, I feel bound to say that I can see no evidence that these figures have been so associated with the plaintiffs' name. It may perhaps be known in the bazar that the plaintiffs are in the habit of importing and selling this particular kind of grey shirtings. There is also ample evidence that they have preference for this particular kind of grey shirtings, but there is, as far as I can see, no evidence that they like them any the better because the plaintiffs import them, or that the figures '2008' are understood by any one to signify that the plaintiffs had in fact imported them. It seems to me that all the evidence in the case, particularly that of the plaintiffs' own native witnesses, goes to show that these figures are understood by buyers to indicate the quality of the manufacture, and that only, and that they are not supposed to have anything whatever to do with the importation. As to any deception of the public, of course, no one acquainted with all that is marked upon these goods by the defendants could ever suppose that the cloth sold by the defendants was imported by the plaintiffs. The name of the defendants' firm is stamped upon the goods several times over in a variety of languages, European and oriental; and all the native brokers, who have given evidence in the case, state themselves to be acquainted with the whole of the marks. They could not, therefore, have been deceived as to who were the importers, and they do not pretend to say that they were so. But it is said that these goods are sold by the brokers to persons of less intelligence who would not read or would not understand the whole of the marks, and whose eyes would be caught by the figures '2008' only. This is quite reasonable, and may be assumed; still what do the witnesses say; they say that native

purchasers buy the cloth by the number '2008,' and not from any examination of the nature or quality of the cloth. That, however, as I understand the law, is not sufficient. The plaintiffs, I will assume, first adopted the combination of figures '2008,' and attached to them some meaning, which is a secret. The public have attached to these words the same or another meaning, namely, that they indicate that the cloth so marked is of a particular quality. Where is the false representation, which is an essential element of the plaintiffs' case, in the defendants' use of these figures? If the meaning to the public of these figures, when expressed in full, is no more than this, "it is hereby represented to the public that this piece of cloth is of a certain quality," then every trader in Calcutta has a right to make this representation, and make it by any words or symbols that he likes. There can be no exclusive right to make such a representation, or to make it in any particular manner. If, indeed, the meaning of the figures as understood by the public is this—"it is hereby represented that these goods were imported by Messrs Nicol, Fleming, & Co.," that would be quite another matter But that is what I do not see anywhere stated in the evidence.

If, therefore, this suit were now before me for final determination, I should feel compelled to say that, in my opinion, the plaintiffs had not made out even a *primâ facie* case. But it will be a manifest inconvenience if, upon this interlocutory application there should be a difference of opinion, giving the parties a right to a second appeal before the suit is heard. That is clearly not desirable. I think, therefore, that, upon this interlocutory application, I am justified in yielding my opinion to that of the Chief Justice and Mr. Justice Macpherson, and not expressing any formal dissent from the judgment of the Chief Justice, which substantially dismisses the appeal.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Sanderson & Co.*

Attorneys for the respondents: Messrs. *Chauntrell, Knowles,* and *Roberts.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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Feby. 4, 5, 6, *and* 11.

IN THE MATTER OF UMBICA NUNDUN BISWAS (AN INSOLVENT).

Insolvent Act (11 *and* 12 *Vict.*, *c.* 21), *s.* 26—*Question of disputed Title—Voluntary Conveyance*—13 *Eliz.*, *c.* 5.

Where an order had been made under s. 26 of the Insolvent Act calling on a certain person to show cause why she should not hand over to the Official Assignee money which it was alleged the insolvent had paid to her shortly before his insolvency, under circumstances which might make the transaction void against the creditors. *Held*, in the Court below, that the transaction was a gift, and, under the circumstances, void as against the creditors within the Statute 13 Eliz., c. 5. *Held* also, that the word 'property' in s. 26 of the Insolvent Act includes money.

Held on appeal, that the matter was not one which could properly be dealt with under the 26th section of the Insolvent Act, as it involved difficult questions of title.

APPEAL from an order of Kennedy, J., sitting as Commissioner of the Insolvent Court, dated the 8th of September 1877. The order was one made under s. 26 of the Insolvent Act, directing one Surno Bhye to pay and deliver forthwith to the Official Assignee the sum of Rs. 11,033 and certain jewellery, which it was alleged formed part of the assets of the estate of the insolvent Umbica Nundun Biswas, and which he had shortly before his insolvency made over to Surno Bhye.

Umbica Nundun was adjudicated insolvent on the 14th of March 1876, and filed his schedule on the 13th February 1877, when it appeared that his liabilities amounted to Rs. 75,800 and the assets about Rs. 4,000 only; that a sum of Rs. 41,000 in addition to jewellery of large value had been given to Surno Bhye, as to which it was objected that they were made over under such circumstances and for such expenses as would be void as against the creditors. Among the items was one of Rs. 11,000 for the repairs of Surno Bhye's house. It was found also that a release had been executed between the insolvent and Surno Bhye on the 26th of January 1876, less than two months before he was adjudicated insolvent. The insolvent and Surno Bhye and other witnesses were examined *vivâ voce* in the matter and on the 3rd of May 1877, at the instance of the opposing

creditors, Messrs. Handford and Crew, it was ordered that Surno Bhye should held and retain, subject to the further order of the Court, Rs. 22,033, being a portion of the sum received by her from the insolvent, and the jewellery received by her from the insolvent; and it was further ordered that Surno Bhye should attend before the Court to show cause why she should not make over to the Official Assignee the said sum of Rs.22,033 and the said jewellery as being assets belonging to the estate of the insolvent.

Cause was accordingly shown and the order now appealed from was made. Kennedy, J., sitting as Commissioner of the Insolvent Court, delivered the following judgment, from which the further material facts fully appear:—

Mr. *Piffard* and Mr. *Jackson* for Surno Bhye.

Mr. *Bonnerjee* for Messrs. Handford and Crew.

KENNEDY, J.—In this case, which comes before the Court under the peculiar powers conferred by the Insolvent Act, s. 26, I am unable to see how, consistently with well-established principles of law, I could permit Surno Bhye to retain the entire sum of money which has come into her hands: and although there is not, so far as I am aware, any case to be found in the books precisely similar in its circumstances, I think that the principles of the two cases mentioned by Mr. Jackson accurately define my duty.

Surno Bhye is, so far as I can discover, one of the principal, if not the principal, Hindu dancing girl in Calcutta, and though past her first youth, retains considerable attractions of appearance and manner. The insolvent, who seems to have succeeded to considerable property within the last few years, took her into his protection three or four years ago, and would appear to have become completely subdued by her fascinations. Apparently, the last fragment of property which he possessed was a zemindari, which, on the 31st May 1875, he sold to Gobindo and Kistonath Coondoo for Rs. 50,000, out of which he paid to Chunumull and Kallychurn Johurry Rs. 5,000 on account of a

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debt probably for jewellery; Rs. 4,000 he paid for the expense of the sale; and the remainder, Rs. 41,000, he on the 3rd June 1875, handed to Surno Bhye. In January 1876, a document, called a release was executed between them. In February the insolvent was arrested, and in March 1876 adjudicated an insolvent on a creditor's petition. He did not file his schedule till February 1877, and it then appeared that he had absolutely denuded himself of all property whatever; that his debts amounted to Rs. 75,000, and that at the time of this gift to Surno Bhye, he was absolutely without further property, all or almost all of this large debt then existing.

Surno Bhye was examined under the provisions of the Insolvent Act, and the important parts of her statement are as follows:—"My name is Surno Bhye. I know Umbica Nund "Biswas. I have known him for the last 10 or 15 years. I can't "say how old he is. He kept me for two years. He left me after "I was in his keeping about two years. He and I have signed "a writing. It related to Rs. 41,000, a gift to me: the particulars "of my claim are all truly written in the paper signed. I first "suggested the writing between us. I had received information "at this time that he had become involved in debt. He never "himself told me that he was heavily involved; in fact I had no "means of knowing his circumstances from any one but him. "I heard he was in debt from him. He brought the money "and said, 'Here I give you the money.' We were in the best "terms at this time. He did not tell me at the time where he got "the money, but afterwards said he had sold a zemindari. I "asked him where he got the money, and he said he had sold a "zemindari." Now if there were nothing more in this case, I think it would be quite impossible for this lady to retain a pice of the money, for it was clearly a gift at a time when the donor was in circumstances wholly insolvent, and must be taken to have been made with the intention to defeat and delay creditors; as I am bound to presume that the insolvent intended that which he must have known to be the necessary and inevitable consequence of his act

As difficulties, however, thickened about the insolvent, this lady, apparently acting under the advice of Baboo Aushootosh

Dhur, one of the most astute Attorneys of this Court, obtained from Umbica Nundun the release mentioned in her evidence.

The instrument recites that Surno had been under his keeping, and had to receive from him divers sums of money; that, being unable to pay the same from time to time as they accrued due, he promised to pay all her dues at once in a lump sum; that at his special request she had pulled down portions of her house and re-built and repaired the same at a very heavy cost; that on the 3rd June he paid to Surno the sum of Rs. 41,000 on the distinct understanding that out of the same she was first to pay herself the sum due to her. It will be observed that this recital distinctly contradicts Surno's own statement, but she alleges this to have been a free gift, and she says that she was not aware of what her attorney wrote. The deed then recites certain payments alleged to have been made by Surno for Umbica, and an agreement that the account should be settled between them: and on their settling an account as in the schedule, it brings in Surno as indebted to the insolvent in Rs. 133-9-0, which was alleged then to be paid to him, but which, so far as I can discover, never got actually into his hands; probably it was the remuneration of Baboo Aushootosh Dhur for his professional services. On examination of the account, I found items purely of gifts and benefits to Surno and payments of salary as mistress: all of which I thought so clearly voluntary that as against the creditors they were absolutely void. I do not say that as to the rest of the case I was satisfied that Surno had made out a good or valid claim. I do not say that that her liability to the estate may not be considerably greater, but that for the purposes of the procedure under the 26th section of the Insolvent Act, I think, according to the decree of the Appellate Court in *In re Dwarkanauth Mitter* (1), the case must be a simple one, and so far as to the gifts and salary for prostitution, I think this case is absolutely simple; that in spite of Mr. Jackson's very ingenious argument, there is nothing to be said in support of these gifts. Mr. Jackson relies chiefly on the case of *Ayerst* v. *Jenkins* (2), where Lord Selborne sitting for the Master of the Rolls refused to set aside

(1) 4 B. L. R., O. C., 63. (2) 16 L R., Eq, 275.

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a deed of trust entered into on the eve of, and apparently with reference to, the celebration of a marriage, incestuous and void by English law; but his entire ground of decision was, that this was an attempt at the suit of the representative of the settlor to set aside a transaction which had been completed and carried out, not for the benefit of creditors, because the case shows expressly that all creditors had been paid off, but for the benefit of those who claimed as volunteers. The case was one of active attempt to set aside a completed transaction, as being based on an illegal transaction for the benefit of a *particeps criminis*, not to get rid of a transaction for which there was no consideration, for the benefit of creditors. He sets forth the doctrines most clearly in page 282 as follows:—Most of the older authorities on the subject of contracts founded on an immoral consideration are collected in the note to *Benyon* v. *Nettlefold* (1). Their results may be thus stated:— (i) Bonds or covenants founded on past cohabitation, whether adulterous, incestuous, or simply immoral, are valid in law, and not liable, unless there are other elements in the case, to be set side in equity. (ii) Such bonds or covenants if given in consideration of future cohabitation are void in law, and therefore of course also void in equity (iii) Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument. (iv) If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law. (v) Under some, but not under all, circumstances, when the consideration is unlawful and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity, and in page 284 he refers to *Rider* v. *Kidder* (2); apparently fully accepting Lord Eldon's doctrine with respect to such transactions being only void as against creditors.

Mr. Jackson tried to show that the latter words of Lord Selborne's judgment were adverse to that view, but on examination it is clearly not so. Lord Eldon first said, "I doubt whether there is any instance of taking the property out of her

(1) M. & Gord, 94. (2) 10 Ves, 360.

hands, except as against creditors." He then goes on to show the grounds he had for suspicion that there was not a complete transfer of such a character as to exclude the resulting trust. Then the property not being of a class which as the law then stood was attachable, he seems to have had some difficulty as to whether it was a fraud on creditors, but his decree directs inquiries which could only have been material, if it could have been held to be so. His reference to *Dundas* v. *Dutens* (1) clearly shows his meaning. But the intervention of bankruptcy always was held to get rid of the difficulty as to non-liability of the property even where the powers of creditors against debtor's property had not been so much extended by statute as they now are *Gilham* v. *Locke* (2) puts the case for Surno as high as it can be put; that is, that a bond without consideration creates a personal liability on the part of the obligor which may be sufficient to take the case out of the statute of fraudulent conveyances in respect of any transaction really and *bonâ fide* entered into in satisfaction of liability on such a bond, but nothing of that kind is the case here I am bound to hold that the transaction here was wholly without consideration which the law can recognise, and that, therefore, it comes within the purport of the Statute of Elizabeth, which avoids such transactions when they affect creditors.

I assume all through this that there was a gift for the benefit of Surno, not merely *benami* for the insolvent. I think it not improbable that this young man was so infatuated as to be willing to denude himself of everything in her favour, probably not unaffected by some delusive idea that she truly loved him, and that by the gift he had secured for himself an earthly paradise; but looking at the recitals in the release, there is much which may suggest a different view of the case, and I by no means decide that this may not be the true view.

As to the repairs of the house, however, they may possibly stand on a different footing. I feel myself quite incapable of affording complete belief to the statements of the witness produced by Surno, and her own statement is strongly against her

(1) 1 Ves., 196. (2) 9 Ves., 612.

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right, still I do not feel myself justified in exercising this peculiar jurisdiction except when the case is perfectly clear. I therefore make the rule absolute only as to the other portions of the sum comprised in it, omitting the sum claimed for re-building and repairs. I give liberty to the Official Assignee to take such proceedings as he may think proper with respect to the residue of the sum of Rs. 41,000, as I have grave doubts as to some of the alleged payments, and also to sue for the sums included in this rule if he be so advised.

I think that the word 'property' in the 26th section is quite sufficient to include money. In s. 24 there is an enumeration including money and closing with the general words property, goods, and effects; in s. 25, stock and shares are placed under a particular provision; in s. 26, all property, save the stock and shares mentioned in s. 25, is made subject to this peculiar power. I think it hard to give to property any meaning except that of the enumeration in s. 24, excluding the stock and shares.

From this order Surno Bhye appealed on the grounds that no order should have been made under s. 26 of the Insolvent Act, that section not being applicable to a case of this kind; that even if s. 26 applied, the rule should, on the evidence and on the finding of the Commissioner that the property was a gift for the benefit of Surno Bhye, have been discharged with costs.

Mr. *Jackson*, Mr. *Phillips*, and Mr. *Evans* for the appellant.

Mr. *Bonnerjee* for Messrs. Handford and Crew, the opposing creditors.

Mr. *Jackson*.—There is no case which shows that in a case like this, where money was actually paid and the transaction completed, it can be set aside. It is not like the case of a bond or deed; the inference to be drawn from the cases is that a transaction like this cannot be set aside. The learned Counsel proceeded to contend,—1st, that under s. 26 of the Insolvent Act, the question of the validity of the gift as against creditors could not be tried; 2nd, that the Statute of Elizabeth did not apply in such a case

as this so as to render the gift void; 3rd, that even if it did apply, a gift actually completed could not be set aside.

On the first proposition he contended that money was not included in the word 'property' in s. 26; that if it was included, it must be money ear-marked, specified, and set apart, and inasmuch as in this case the insolvent could not have recovered the money in an action of trover, it was not so ear-marked as to form part of his property; that if it were included in the term 'property,' the words of s. 26 showed that it was only property subject to the control of the insolvent which could be dealt with, and that this question was not one for trial and disposal under s. 26.

On the 2nd point the learned Counsel contended that the money could not have been taken in execution, and therefore the Statute of Eliz. (13 Eliz., c. 5) did not apply, and referred to Statute 1 & 2 Vict., c. 110, which makes money liable to attachment in execution in England, but which does not apply in this country. The following cases and authorities were cited:—*Sims* v. *Thomas* (1); *Barrack* v. *McCulloch* (2), *Duffin* v. *Furness* (3), *Wood* v. *Wood* (4), *Collingridge* v. *Paxton* (5), *In re Dwarkanath Mitter* (6), *In re Ajudhia Prasad* (7), May's Fraudulent Conveyances, 426 377, *Ayerst* v. *Jenkins* (8), *Rider* v. *Kidder* (9), *Reese River Silver Mining Co.* v. *Atwell* (10), *Robinson* v. *Peace* (11), *Lott* v. *Melville* (12).

Mr. *Bonnerjee* for the opposing creditors contended that the case was one which could be dealt with under s. 26, and referred to the case of *In re Fulchand Johurri* (13), in which such a question had been gone into. He also contended that this money was part of the property of the insolvent; that on the evidence there was not a gift within the cases cited on the other

(1) 12 A. & E., 536, at p. 553.
(2) 3 Kay. & J., 110.
(3) Cases temp., King., 77.
(4) 4 Q. B., 397.
(5) 11 C. B., 683.
(6) 4 B. L. R., O. C., 63.
(7) 7 B. L. R., 74.
(8) L. R., 16 Eq., 275.
(9) 10 Ves., 360.
(10) L. R, 7 Eq., 347.
(11) 7 Dowl., 93.
(12) 9 Dowl., 882.
(13) Unreported.

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side; that if there were a gift, it was void by Hindu Law, 2 Colebrooke's Digest, 181, v. 53; and that under the circumstances it was in any case void as against creditors under s. 24 of the Insolvent Act.

Mr. *Evans*, in reply, cited *Foley* v. *Hill* (1), *Devaynes* v. *Noble* (2), *Penell* v. *Deffell* (3), and *Great Eastern Railway* v. *Turner* (4).

The judgment of the Court was delivered by

GARTH, C. J.—We allowed the case to proceed in the hope that, as the parties have already incurred so much expense and trouble, we might have arrived at some satisfactory solution of it, which might obviate the probability of any further litigation. But the further we proceeded the more difficult and complicated the matters in dispute became; and we could no longer doubt that both as regards the facts and the law, some very serious questions of title and otherwise are at issue between the parties.

Under these circumstances, we felt that in the exercise of our discretion, we should be wrong in attempting to settle so serious a dispute in a summary proceeding under s. 26 of the Insolvent Act.

We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section and to leave the parties to settle such questions by a regular suit, and we entirely approve of that practice; see the case of *In re Dwarkanath Mitter* (5).

The procedure under s. 26 is not calculated to effect satisfactorily the trial of difficult questions of title. And our judgment, even if we thought it right to decide the matter, would not be conclusive. Either party might, if they chose, raise the same question again in a regular suit.

We think, therefore, that this appeal should be allowed, but we think that under the circumstances the rule (obtained, as

(1) 1 Phillips, 399.
(2) 1 Mer., 529.
(3) 4 De Gex. M. & G., 372.
(4) L. R., 8 Ch. Ap., 149.
(5) 4 B. L. R., O. C., 63.

we consider it was, at the instance of Mr. Bonnerjee's client) should be discharged without costs on either side, it being quite understood that we give no opinion as to the merits of the dispute.

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Appeal dismissed.

Attorneys for Surno Bhye: Messrs. *Ghose* and *Bose.*

Attorneys for the opposing creditors: Messrs. *Orr* and *Harriss.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby

MANICK CHUNDER DUTT (PLAINTIFF) *v.* BHUGGOBUTTY DOSSEE (DEFENDANT).

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Hindu Law—Adoption of only son—Sudras.

The adoption of an only son is invalid according to the Bengal school of Hindu law, and the prohibition applies as well to Sudras as to the higher castes.

APPEAL from a decision of Kennedy, J., dated the 14th of August 1877.

The suit was brought to establish the adoption of the plaintiff, and for a declaration that as such adopted son he was entitled to certain property. The plaint stated that, in April-May 1865, the plaintiff, who was then of the age of eight months or thereabouts, and known by the name of Hari Doss Dey, was given by his father Nocoor Doss Dey, of Bow Bazar in Calcutta, a Hindu inhabitant of the Sudra caste, to Rajkrishna Dutt, of Sunkar Haldar's Lane in Calcutta, a Hindu of the same caste, and to his first wife Kalimoney Dossee (both since deceased, for the purpose of being adopted by them as their son, they having no issue of their own; and the said Rajkrishna Dutt and Kalimoney Dossee then took the plaintiff for the purpose of adopting him, and in due form did adopt him as their son according to the manners, usages, customs and law applicable to the Hindus of Lower Bengal, and gave him the Name of Manick Chunder Dutt.

The plaintiff was admitted to be at the time of the adoption the only living son of his parents, but it was argued for the

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plaintiff that, being of the Sudra caste, and the adoption having been completed, the adoption was valid.

KENNEDY, J., referring to the decision in the case of Raja *Upendra Lall Roy* v. *Rani Prasannamayi* (1), decided by L. S. Jackson and D. Mitter, JJ., gave judgment as follows:—

I do not think I should be justified in dissenting from the decision of Mr. Justice Mitter on a question of this kind, even if I were not in fact bound by the case as being the decision of the Appellate Court. Even if I were satisfied on the facts, I should certainly not decide in favour of the plaintiff in the teeth of a judgment of the Appellate Court to which Mr. Justice Mitter was a party.

The learned Judge also held that the adoption was not proved.

Mr. *Bonnerjee* and Mr. *T. A. Apcar* for the appellant.

Mr. *J. D. Bell* and Mr. *Hill* for the respondent.

Mr. *Bonnerjee* contended that the adoption was not invalid. There is no authority that the adoption of an only son among Sudras is illegal. In *Janokee Debea* v. *Gopaul Acharjea* (2) the parties were Brahmins. In *Raja Upendra Lal Roy* v. *Rani Prasannamayi* (1), it does not appear whether the parties were Sudras or not. There is no direct authority that such an adoption, when made, is absolutely void. From the texts of Hindu law on the subject it would appear it was not invalid; see Shamachurn's Vyavastha Darpana, v. 654,—"The adoption of an only son, if made by the performance of the rites ordained in the Vedas, cannot be invalidated or set aside although it be deemed not to be a good one:" to the same effect is the note to v. 273, Colebrooke's Digest, Vol. III. In *Joymony Dossee* v. *Sibosoondry Dossee* (3), it was held that an only son might be adopted: there the parties were Sudras, and a distinction was drawn between Brahmins and Sudras, though that was only as to the performance of the ceremonies of adoption.

(1) 1 B. L. R., A. C., 221. (2) I. L. R., 2 Calc., 365.
(3) Fulton, 75.

The cases of *Veerapermall Pillay* v. *Nurain Pillay* (1), *The Rajah of Tanjore* (2), *and Mandram* v. *Kashsee Pandey* (3) show that the adoption of an only son, though illegal and even sinful, is not invalid when once it has taken place: to the same effect are the cases of *Chinna Gaundan* v. *Kumara Gaundan* (4) *Singamma* v. *Vinjamuri Venkatacharlu* (5), *Mussamut Tikday* v. *Lalla Hureelall* (6), *Vyankatrav Anandrav Nimbalkar* v. *Joyavantrav* (7), Morley's Digest, Vol. I, pp. 16 and 17, cases 37, 38, 39, 41, 43; and p. 24, cases 103—107; and Macnaghten's Hindu Law, 67 note. In *Nilmadub Doss* v. *Bishumbhur Doss* (8), the point was referred to but not decided, the adoption being found not to have taken place. That there is a distinction between Sudras and Brahmins in respect of adoption is shown by the cases of *Behuri Lal Mullick* v. *Indramani Chowdhrain* (9), *Chinna Nogayya* v. *Pedda Nagayya* (10), and *Singamma* v. *Vinjamuri Vencatacharlu* (11), The only direct decision against the appellant's contention is that of *Raja Upendra Lal Roy* v. *Rani Prasannamayi* (12), but it is submitted that the texts which are given as authority for the decision are not those which ought to govern the case. The Dattaka Chandrika and the Dattaka Mimansa are the chief authorities on adoption, it being the rule that when they differ, the former is followed in the Bengal school; see the Preface to Shamachurn's Vyavastha Darpana, p. 19; Macnaghten's Hindu Law, preliminary remarks, p. 23. The learned Counsel referred to the Dattaka Mimansa, s. 4, v. 1; Dattaka Chandrika, s. 1, v. 29; Menu ch. ix, v. 168; Shamachurn's Vyavastha, v. 570; and contended that there was no absolute prohibition of the adoption of an only son: such an adoption, though blameable, might be made: the sin of making it is not sufficient to make the act wholly void when it has been

(1) 1 Str. Notice of Madras Cases, see p. 106.
(2) 1 *Ibid.* 107.
(3) 4 Sel. Rep, 70.
(4) 1 Mad H. C., 54
(5) 4 Mad. H. C., 165, at p. 171.
(6) W. R., 1864, Gap No., 133.
(7) 4 Bom. H. C., A. C., 191.
(8) 13 Moore's I. A., 85.
(9) 13 B. L. R., 401.
(10) I. L. R., 1 Mad., 62
(11) 4 Mad. H. C., 165.
(12) 1 B. L. R., A. C., 221.

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done : the sin is in the giver and receiver, and the adopted son should not suffer for it. Shamachurn says (Vyavastha Darpana, v. 570), that the more modern Hindu lawyers say that such an adoption, though immoral, is valid. The strict rules of the old Hindu lawgivers are not to be adhered to in every case ; see the Full Bench case of *Kery Kohtany* v. *Moneeram Kohta* (1), in which Mitter, J., was in a minority. In *Gocoolanund Doss* v. *Wooma Daee* (2), Macpherson, J., upheld the adoption and cited a passage from 1 Strange's Hindu Law, p. 85, which lays down that the selection is a matter of discretion and not of absolute law.

Mr. *Hill* for the respondent.—Adoption is an improper act in itself in any case, and is only allowed by the Hindu law in certain cases. The object of it is to perpetuate lineage : in such a case as this the very object of it would be defeated. There is no difference in any of the authorities as to the prohibition, which is in express and strong language, and creates an absolute incapacity to adopt an only son; see Dattaka Mimansa, s. 4, v. 1 ; Dattaka Chandrika, s. 1, vv. 29, 30 ; Colebrooke's Digest, Vol. III, v 273. The prohibition against a woman adopting a son without consent has always been absolute; why not the prohibition against adoption of only son, which is just before it and expressed in the same way. A father is incapable of giving an only son. It would be an illegal gift, and void ; see Colebrooke's Digest, Vol. II, vv. 62, 65—Duttaka Mimansa s. 4, v. 5, which show a want of dominion in the father over an only son : by giving him in adoption the father would be defeating the rights of his ancestor. Verse 67 of 2 Colebrooke seems also to make the adoptive father incapable of receiving him in adoption ; see also Dattaka Mimansa, s. 4, v. 8. The forms and ceremonies necessary for giving in adoption show that an only son cannot be given : Dattaka Mimansa s. 5, vv. 11, 13, 14, "Capacity to give" is there stated to "consist in having a plurality of sons." In the case of *Jaookee Debea* v. *Gopaul Acharyea* (3) the adoption of an eldest son was upheld, but the adoption of only son creates an absolute extinction of lineage

(1) 13 B. L. R., 1. (2) 15 B. L R., 405
(3) I. L. R., 2 Calc , 365.

and of the power of conferring benefit on ancestors, and that is the distinction. The adoption of an only son is taken to be an interference with the rights of others, and illegal Almost all the cases where such an adoption has been upheld are cases where the relation of the only son has not been completely changed by the adoption, but he remains the son of both the natural and adoptive fathers. The English commentators, with the exception of Sir F. Macnaghten, assert that the adoption of an only son, although improper, is not invalid—1 Macnaghten's Hindu Law, p. 67 ; 1 Strange's Hindu Law, pp. 84, 87 ; but the cases collected and published by them give no support to this opinion—2 Macnaghten's Hindu Law, p. 178, Case 3, p. 179, Case 4, and p. 195, Case 15 ; 2 Strange's Hindu Law, pp. 106, 107. As to Sir F. Macnaghten's opinion, see his Considerations, p. 147, rule 8, and p. 148, where he says that Jagannatha's Commentary is entitled to no great weight. At p. 205 he says that the point did not really arise in the case of *Veerapermall Pillay* v. *Narain Pillay* (1). As to the rights of a son whose adoption is held to be invalid, see per Scotland, C.J., in *Bauani Sankara Pandit* v. *Ambabay Ammal* (2) *Shumshere Mull* v. *Dilraj Konwur* (3), *Nundram* v. *Kashee Pundey* (4), and in another stage (5). The case of *Joymony Dossee* v. *Sibosoondry Dossee* (6) was a case of *dwayamushyayana* adoption, the adopted son retained both names. *Chinna Gaundan* v. *Kumara Gaundan* (7) only follows former cases, and apparently without looking closely to see what they decided, as is the case with *Vyankatrav Anandrav Nimbalkar* v. *Jayavantrav* (8). In *Mussamat Tikday* v. *Lalla Hureelall* (9) the cases do not appear to have been before the Court : there is no argument. In *Gocooolanund Doss* v. *Wooma Dabee* (10) the point does not appear to have arisen directly : the opinion of Macpherson, J., as to the adoption of an only son is in my favour. The case of *Raja Upendra Lal*

(1) 1 Str. Notes of Madras Cases, 78, see p. 106.
(2) 1 Mad H. C. Rep., 363
(3) 2 Sel Rep., 169, at p. 171.
(4) 3 Sel. Rep., 232.
(5) 4 Sel Rep , 70
(6) Fulton, 75.
(7) 1 Mad. H C., 54
(8) 4 Bom. H C., A C., 191
(9) W. R., 1864, Gap. No., 133
(10) 15 B. L. R , 405.

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Roy v. *Rani Prasannamayi* (1) is a direct authority in my favour, and is a general ruling applying as much to Sudras as to other castes. In *Nilmadub Doss* v. *Bissumbhur Doss* (2) the opinion of the Privy Council was that the adoption of an only son was invalid. In other cases Sudras are expressly excepted, where it is intended to exempt them : therefore the inference is that the prohibition was intended to apply to them.

Mr. *T. A. Apcar* in reply.

Cur. adv. vult.

The following judgments were delivered :—

MARKBY, J.—In this case the plaintiff-appellant claims to have been adopted by the late Rajkrishna Dutt in his lifetime, and he brings this suit to have it declared that this adoption is valid, and that as such adopted son he is sole heir to his adoptive father. Mr. Justice Kennedy held upon the authority of the case of *Upendra Lal Roy v. Rani Prasannamayi* (3), (i) that the adoption, if made, was invalid, because the plaintiff, at the date of the alleged adoption, was the only son of his father, and (ii) that no adoption had in fact taken place.

The case comes before us upon appeal from this decision, and the first question for consideration is, whether the adoption of an only son is invalid under the Hindu law. If this question is answered in the affirmative, there will be no necessity for deciding the second, which is one of fact.

I have gone carefully through all the authorities that we were referred to and that I have discovered, and I am surprised to find, how much less decisive authority there is upon the point than would appear from some of the modern text-writers. Many of the decisions commonly referred to have no bearing at all upon the question; in others the point is referred to, but it is extremely difficult to ascertain whether it was really considered.

The earliest decision of the late Sudder Dewany Adawlut usually quoted on this point is that of *Ranee Bhudorun* v.

(1) 1 B. L. R., A. C. 221. (2) 13 Moore's I. A., 85.
(3) 1 B. L R., A. C., 221.

Hemunchul Sing (1), which was decided in 1813, but no question of adoption was really decided in that case at all. The respondent, in a suit brought against him to account for the profits of certain property, only alleged that he had been "merely" adopted by a previous owner, and what he really relied on was a temporary settlement made by Government with himself. The appellant, no doubt, objected that the respondent as an only son could not be adopted; and from a statement made in another case reported in the same volume, to which I am next about to refer, it is probable that the opinion of the pundits was taken upon this point, and that they thought such an adoption invalid (see p. 221). But no opinion whatever was expressed upon this point either by the Provincial Court or by the Sudder Dewany Adawlut; the suit being decided in favour of the respondent upon the other ground.

In Rajah Shamshere Mull v. *Ranee Dilraj Konwur* (2) there was, when the suit was brought, only one adoption in dispute, that of the plaintiff's father by a widow of Rajah Bheem Mull. But on the death of the original defendant, his widow, Dilraj Koonwar, adopted Tej Mull, the grandson of her husband's uncle, and continued the suit. The Zillah Court held that the adoption of the plaintiff's father was bad, not because he was an only son, which he was not, but because Rajah Bheem Mull had not authorized it; that consequently the plaintiff had no claim to be heir of Rajah Bheem Mull and on this account the Zillah Judge dismissed the suit. On appeal to the Provincial Court of Benares, this decree was affirmed. On further appeal to the Sudder Dewany Adawlut, the pundits were asked as to the validity of both adoptions. They considered the adoption of the plaintiff's father illegal for the reason assigned; and the adoption of Tej Mull they also declared to be illegal, he being the only son of his father, unless it could be supported as a *dwayamushyayana* adoption. But ultimately nothing was decided upon this point, because the Court agreed in the view that the adoption of the plaintiff's father was bad, and that therefore the plaintiff had failed to make out his title.

(1) 2 Sel. Rep., 59. (2) *Ibid.* 169.

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The next case is that of *Nundram* v. *Kashee Pandy* (1), which is dated June 30th, 1824, but was really decided on June 30th, 1823. In that case the plaintiff claimed property which had belonged to Pullut Pandey by two titles, (i) as his heir by adoption, (ii) under a deed of gift. The adoption was disputed on the ground that the plaintiff was an only son; and the gift was disputed on the ground that the property was inalienable. The Zillah Court held that both the adoption and gift were valid. This judgment was reversed, on appeal, by the Provincial Court, where it was held that both the adoption and the deed of gift were invalid: the adoption upon the ground that the plaintiff was the only son, and the gift upon the ground that the property was inalienable. A special appeal was then admitted by the Sudder Court, and the pundits were asked whether it is allowable, according to the law current in Tirhoot, to adopt an only son. A question was asked also as to the validity of the gift. The pundits declared both the adoption and the gift to be invalid, and after perusing this opinion the Court (Leycester and Dorin) dismissed the appeal.

This, it will be observed, is the earliest judicial authority upon the question in Bengal. It was necessary to determine the point, because the two titles, that by gift and that by adoption, were wholly independent, and the determination was against the validity of both titles. But the litigation in this suit was subsequently re-opened by an application for review, applied for on the ground that the vyavashta, upon the strength of which the appeal was dismissed by the Sudder Dewany Adawlut, had been obtained by bribery. The further report of the case is in 4 Sel. Rep, p. 89 (edn. 1870). The review was admitted, and fresh pundits were consulted by the Sudder Court upon the same two points as before. The same answers were given. Upon this Mr. Smith expressed the opinion that the plaintiff ought to get a decree. He considered that he was at liberty, on the re-hearing, to go into entirely new facts; and he thought it proved that the plaintiff was not an only son; he also thought that the gift was valid, and he further said that "probably" the adoption even

(1) 3 Sel. Rep., 232.

of an only son was valid. But Mr. J. H. Harrington and Mr. Martin held otherwise. They thought that the question as to whether plaintiff was an only son could not be re-opened, and taking him to be so, they held that his adoption was illegal: that the gift was also illegal: and they confirmed the decision originally passed by the Sudder Court.

It appears, therefore, that, in this case, which was twice heard, and in which the point expressly arose, four Judges, against the doubtful opinion of one, held that the adoption of an only son was invalid. There could not be a stronger authority against the validity of the adoption. How it is possible that Mr. Morley could have so far misunderstood this case as to represent it as a decision that the adoption of an only son once made could not be set aside, I cannot understand. This misstatement of this important decision has no doubt led to considerable misconception.

In *Debee Deal* v. *Hur Horsing* (1) the question was as to the validity of the adoption of the defendant. The defendant was the grandson of the paternal uncle of his adoptive father, and only son of his natural father. The adoption was established in the City Court of Benares, the objection that the defendant was the only son apparently not having been taken. On appeal to the Provincial Court it was objected that the plaintiff was the only son of his father, and the Court pundits signified their opinion that the adoption of an only son was invalid. But the respondent filed an opinion to the effect that a mother might give her son upon the special condition that he should be the son of two fathers (*dwaymushyayana*). The Court pundits were thereupon again consulted, and they agreed that the adoption as stated by the defendants was legal. The Judge of the Provincial Court, evidently proceeding upon this view, assumed the adoption to have been in this form, and dismissed the appeal. The plaintiff then appealed to the Sudder Court. Mr. Smith (who had apparently therefore seen reason to doubt his former opinion) admitted the appeal, and the pundits were again consulted. They thought that the adoption could

(1) 4 Sel. Rep., 302.

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not be supported, even as a *dwaymushyayana* one, because the natural father had not consented to it On the authority of this opinion, Mr. Sealy and Mr. Leycester concurred in holding the adoption to be invalid, and they reversed the decree of both the lower Courts. There is no judgment given in the report, and we cannot, therefore, be quite sure what the opinion of the Judges was. It is most probable that they entirely agreed with the pundits; but it is also just possible that they may have considered the adoption invalid, simply on the ground that the natural father's consent had not been given. I do not, therefore, reckon this as a decisive authority on the question.

In the case of *Dullabh De* v. *Manu Bibi* (1), the statement of the plaintiff was, that she and her husband were asked by the defendant to give their only son to her to be adopted, but they refused. The plaintiff was, however, then pregnant, and she and her husband promised that, if she were delivered of a male child, they would give that child to the defendant. A son was born to the plaintiff, and was accordingly given to the defendant, but owing to its tender age the child was returned to its natural mother. Some years afterwards, and after the child's elder brother had died, the defendant with due solemnities, including a sacrifice for male issue, "publicly constituted him her adopted son." The Judge of the Provincial Court of Dacca, after consulting the pundit of that Court, held the adoption valid. One of the Judges of the Sudder Court (Rattray) thought an appeal ought to be admitted, upon the ground that the suit was improperly framed; but two other Judges (Ross and Turnbull) thought otherwise; and "concurring in the facts and law as found and laid down by the lower Court," dismissed the appeal

If it was intended in this case to lay down, as a general rule, that the adoption of an only son is valid, it is certainly very remarkable that no reference was made to the pundits of th Sudder Court, or to the previous decisions, one at least of which is a very strong one and distinctly contrary. But Mr. Morley (Digest, p. 18,) does not understand this case as deciding anything more than that "where the gift and acceptance

(1) 5 Sel. Rep., 50.

of a second son preceded the death of an elder son given in adoption, then the full completion (*i.e.*, after the death of the elder son) is legal." Possibly it may be so. It may have been thought that the gift, at the time there was an elder son living, being valid, the completion of the adoption by a performance of ceremonies was not illegal. Whether or no this would be a correct opinion I do not say. I am disposed to think it would not; but it seems to me more reasonable to suppose that this case was somehow distinguished than to suppose that the previous decision in *Nundram* v. *Kashee Pandy* (1), which was so fully and carefully considered, was overruled.

No case bearing upon this subject in the Sudder Adawlut was produced, nor have I found any between this, which was decided in 1830 and 1859. In the latter year a suit came up on appeal from Cuttack, in which one of the plaintiffs made title as an adopted son Both this Court and the Court below held that the plaintiff had failed to prove his adoption, and this is expressly made the ground of the judgment in the Sudder Court. But the Court (Trevor, Samuells, and Bayley) thought fit also to express the opinion that the plaintiff as the eldest, not the only son of the adoptive father's brother, could not be adopted. If this were good law, of course, a portion, an only son could not be adopted. But it is, I believe, the first and only time that it has been held by any Court of Justice that an eldest son cannot be adopted; and the contrary has been laid down in two succeeding cases—*Sheetaram* v *Dhunnook Dharee Sahye* (2) and *Janokee Debea* v. *Gopual Acharyea* (3). I think, therefore, that this case also ought not to be accepted as an authority.

These are all the cases I am aware of in the late Sudder Court. In the late Supreme Court there is one case only—*Joymony Dassee* v. *Sibsoondry Dassee* (4)—decided in 1837. There the adoption of any only son was held valid; but the report which is exceedingly brief, leaves it very doubtful whether the ground of the decision was not that the adoption was a *dwaymushyayana*, and if so, it is, of course, not in point.

(1) 4 Sel. Rep., 70.
(2) 1 Hay, 260
(3) I L R, 2 Calc., 365.
(4) Fulton, 75.

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There are two cases in this Court. The first is that of *Mussamat Tikday* v. *Hurreelall* (1). I shall have to discuss that case very fully upon another point which arises in this case. It is sufficient to say now that there the adoption was in the *kurta* or *kritima* form. But a son adopted in the *kritima* form does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law, pp. 668, 669, 676, 677, and 678). The cardinal reason, therefore, why an only son cannot be adopted,—namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed which are necessary for the salvation of his ancestors,—does not apply. There cannot be a more complete case for the application of the maxim *cessante ratione cessat et ipsa lex.* It is, I think, clear that no decision as to the validity of an adoption, where there is no extinction of lineage, can be used as an authority to support an adoption where such extinction takes place.

The other decision of this Court is that of Mr. Justice L. S. Jackson and Mr. Justice D. N. Mitter in the case of *Raja Upendra Lal Roy* v. *Rani Prasannamayi* (2). Most of the authorities were considered in that case, and it was expressly held that the adoption of an only son was in valid. The suit was dismissed upon that ground ; and a decision of the Madras Court to the contrary, which I am about to notice, was expressly dissented from.

In the Madras Courts there are two decisions. In *Pillay* v. *Pillay* (3), (decided by Sir Thomas Strange whilst he was Recorder) the complainant, whose adoption was disputed, had an elder brother by a former marriage living at the time of the adoption (p. 106). No question therefore arose in this case as to the validity of the adoption of an only son. But Sir Thomas Strange thought fit, nevertheless, to express an opinion that the adoption of an only son was valid. But, as the learned Judge has elsewhere told us (Strange's Hindu Law, Vol. I, p. 102), he based this decision " upon comparatively imperfect materials ;" and the decision has been criticized by Sir Francis Macnaghten (see

(1) W. R., 1864, Gap. No., 133. (2) 1 B. L. R., A. C., 221.
(3) 1 Str. Notes of Mad. Cases, 78.

Considerations of Hindu law, p. 147, 187). Its chief importance depends on the relation it contains of the case of the *Raja of Tanjore* (see p. 107 of the Report), from which it would appear that the pundits of Bengal (including Benares) and Madras had given an opinion that the adoption of an only son was valid. But it does not appear that these opinions were ever submitted to any Court, nor is it said upon what texts they are based, and I believe it to be a clear principle, understood and acted upon ever since our Courts have been established, not to accept as authority the opinions of pundits unconfirmed by judicial decision and unsupported by texts. Nor can I account for this unanimity of the Bengal pundits in favour of the adoption of an only son. They were very frequently consulted upon this point by the Sadar Dewany Adawlut and the Provincial Courts, and so far as appears from the Sadar Dewany Adawlut Reports, their opinions were unanimous the other way, except in in one solitary instance, that of the Court pundit of Dacca, *Musst. Dullobh De* v. *Manu Bibi* (1), and this pundit gives no authorities.

The other case in Madras is a decision of the late Chief Justice Sir Colley Scotland and Frere in *Chinna Gaundan* v. *Kumara Gaundan* (2). There the adoption of an only son was distinctly held to be valid. The Chief Justice relies on the case of *Pillay v. Pillay* (3) just referred to; another case of *Pillay* v. *Pillay*, which I have not been able to see; *Nundram* v. *Kashee Pandey* (3); and *Joymony Dassee* v. *Sibosoondry Dassee* (4), all of which he takes to be in favour of the validity of the adoption of an only son. I have already pointed out to what extent three of these cases are really authorities for that proposition. It is clear that the Chief Justice was misled by Morley as to the true result of the case of *Nundram* v. *Kashee Pandey* (3), which, as I have shown, was directly contrary to what the learned Chief Justice supposed.

Only one case has been quoted from Bombay. It would be possible to make some observations upon that decision as it appears in the report, which is not a satisfactory one, but it is

(1) 5 Sel. Rep., 52.
(2) 1 Mad. H. C., 54.
(3) Sel. Rep, 232.
(4) Fulton, 75

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impossible to deny that the two Judges who decided it (Warden and Gibbs, JJ.) thought that the adoption, which was of an only son, was legal.

It was stated in the argument that it had been held that in the Punjab generally an adoption of an only son was legal, but we have not been shown any authority upon which that statement could be made. The only case to which we were referred to does not bear out that statement. In *Ajoodhia Pershaud v. Mussamut Dewan* (1), Simson, J., held in special appeal that the adoption of an only son was valid; it having been found by the lower Court on the evidence "that by the usage in Delhi generally, and in respect of the caste of the litigants in particular, the custom is to receive an only son in adoption." A former decision was referred to, which was also a case from Delhi, in which the adoption of an only son had been upheld. Lindsay, J., differed from Simpson, J., but I confess I do not understand upon what grounds, for the adoption was clearly a legal one in Delhi. But the case is no authority as to the general law either of the Panjab or of any other part of India.

I now pass to the text-books by English writers.

Sir Thomas Strange, at Vol. I, p. 87 of his treatise on Hindu Law (London, 1800), says, "so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good, according to the maxim of the civil law prevailing perhaps in no Code more than in that of the Hindus, *factum valet qud fieri non debuit.*" But in the Appendix, p. 107, he quotes the high authority of Mr. Colebrooke to the contrary. A pundit had given his opinion that "if a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother." Upon this opinion Mr. Colebrooke made the following observations: "If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of a son, both to him and to his adoptive father. See notes to

(1) 5 Punjab Record, p. 56.

Mitakshara on Inheritance, ch. i, sec. x, 1, and sec. xi, 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden."

The conclusions of Sir F. Macnaghten's Considerations of Hindu Law, p. 147 (Serampore, 1824), are thus stated: "The gift of an only son in adoption is absolutely prohibited; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable *piacle*. It is indeed said that an only son may be so given; but it might be said in the same sense that a man may perpetrate any wickedness if he be content to forego all hopes of salvation and be condemned to everlasting punishment.

"By the gift of an only son, the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned." Nothing in the Hindu law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an *eldest* son is forbidden as sinful. The crime of giving an *eldest* has never been considered so heinous, as that of giving an only son. In the one case a Hindu retains, in the other he casts away, the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little less than apostate from the Hindu religion."

Sir W. H. Macnaghten, in his Principles and Precedents of Hindu Law, speaking of the prohibition against adopting an only son, says, at p. 67 of Vol. I (Calcutta, 1829) in a note: "But this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfor having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family." There is no doubt *sometimes hardship* upon the adopted son, if the adoption be held to be invalid; but he does not, as here stated, in that case lose all claim to the property of his natural father: *Bawani Sankara Pandit* v. *Ambabay Ammal* (1). However, in Vol. II, p. 179 the same

(1) 1 Mad. H. C. Rep., 363.

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author expresses a contrary and, what I think must be considered, his final opinion. He quotes an opinion of the pundits at p. 178 of Vol. II, that a gift of the survivor of two sons is invalid. Upon this he observes in a note: "It will be observed that the answer is not directly in point. The question was, is it legal to adopt a son under such circumstances? and the reply states that it is illegal, under such circumstances, to give away a son in adoption; but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading eternal torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect."

Mr. Justice Strange, in his Manual of Hindu Law, pp. 18 and 19, contests the position that the adoption of an only son can be held valid. The passage is quoted at length in *Chinna Gaundan* v. *Kumara Gaundan* (1). It is of little value, as it puts on a par the objection to the adoption of an eldest and an only son, which shows, to say the least, a want of discrimination.

Mr. Sutherland, in his Synopsis (Stokes' Collection of Hindu Law Books, p. 665), says: "An only son cannot become an absolutely adopted son (sudha dattaka), but he may be affiliated as a *dwaymushyayana* or son of two fathers. In this case the reason of the prohibition,—*viz* extinction of lineage to the natural father—would not apply."

It remains to notice the Hindu text-writers. The earlier Hindu text-writers are of course the source from which we ought ultimately to derive the law, and are, therefore, the most important authorities of all. But the difficulty is in ascertaining what rule it was intended to lay down. There would indeed be less difficulty if the view of Mr. Justice Dwarkanath Mitter in *Upendra Lal Roy* v. *Rani Prasannamayi* (2) could be accepted, that in the matter of adoption all distinctions between religious and legal injunctions are inapplicable. That distinction, however, is in my opinion too well established to be entirely put aside Nor do I see that any sub-

(1) 1 Mad. H C. Rep. 54. (2) 1 B. L. R., A. C., 221—22

stantial ground why that distinction should not be applied in cases of adoption as well as in other matters of Hindu law, all of which are in a sense matters of religion. After full consideration Mr. Justice Romesh Chunder Mitter thought it right to apply that distinction in the case of an adoption of an eldest son—*Janokee Debea* v. *Gopaul Acharjea* (1), and I concurred in that view. No one disputes, however, that the authoritative text-books of Hindu law do, in fact, contain a prohibition against the adoption of an only son, and in order to arrive at a conclusion whether this prohibition invalidates an adoption actually made, I think we ought to consider at one view (1) the language of the prohibition itself, (2) the authoritative commentaries upon it, and (3) the decided cases; and that we ought to see whether, upon the whole, the adoption is, according to modern usage, to be considered as invalid. It was indeed argued that the language of the text-books themselves countenanced the view that the adoption of an only son, though blameable, was not invalid, because whilst the giving of an only son is forbidden, the receiving him is not; whereas if the adoption were illegal, both would have been forbidden. But this is not so as far as I have seen. It is certainly not so in the Dattaka Mimansa, the Dattaka Chandrika, or the Mitakshara. The authors of these treatises all quote the same text of the sage Vashishtha, which is the foundation of the whole doctrine. This text is quoted at length in Colebrooke's Digest, Vol. III., Book 5, v. 273, and I need not therefore repeat it here. It clearly prohibits both the giving and the receiving of an only son in adoption, and I do not find the slightest attempt to qualify this prohibition in any passage of these three writers. The first and, as far as I am aware, the only Hindu text-writer of authority who has suggested that this prohibition should be qualified is a much more modern one, namely Jagannatha, the author of the work popularly known as Colebrooke's Digest. He says in his note on the passage of Vashishtha above referred to (Colebrooke's Digest *ubi. supra*). "As an only son should not be given, so he should not be sold or deserted. Sale is a great offence, even though made in a season of calamity, when a maintenance cannot be

(1) I L R., 2 Calc., 365.

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provided; desertion is a great offence, because the family becomes thereby extinct. Thus the *Pracasa*—Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct: but this does not invalidate the adoption of such a son actually given to him." Opinions differ as to the precise value of Jagannatha's authority, but though of course it is far inferior to that of the authors of the three more ancient treatises above referred to, it is certainly entitled to considerable weight.

Some attempt was made to show that Srinatha Bhatta, the author of the Dattaka Nirnaya, recognized the adoption of an only son as valid, and there is perhaps some countenance for this in the way this author is quoted by Sir F. Macnaghten at p. 126, but I should be very unwilling to draw any inference as to the opinion of any writer whose language I had not myself seen.

If this recapitulation of the authorities be carefully considered, I think it will be seen that there are only four cases in which it is clear that the point properly arose, and was decided: the case of *Nundram* v. *Kashee Pandy* in the Sudder Dewany Adawlut; the case of *Raja Upendra Lal Roy* v. *Rani Prasannamayi* in this Court; the case of *Gaundan* v. *Gaundan* in the High Court of Madras; and the case of *Nimballear* v. *Ramadim* in the High Court of Bombay. Of these, the two Bengal decisions are against the adoption; the decisions of Madras and Bombay support it. Of the English text-writers, Colebrooke, the two Macnaghtens, Sutherland, and Mr. Justice Strange, all think the adoption illegal; there is only one English text-writer, Sir Thomas Strange, on the other side, backed no doubt by the important but solitary opinion of Jagannatha amongst the Hindu text-writers.

It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son; and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully-considered decision of Jackson and Dwarkanath Mitter, JJ., and the equally careful decision of four Judges of the Sudder Court.

This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases with great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought, in Bengal, to be held to be invalid, wherever the effect of holding such adoption to be valid, would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation.

Of course the question whether this particular case can be taken out of the general rule is a wholly different one; and the appellant before us has contended that, even if, as a general rule, the adoption of an only son be invalid, still the rule does not apply to Sudars. No reason was given for excepting Sudras from the rule, and the principle upon which the rule is based,—namely, that a man shall not be allowed to extinguish his lineage to the detriment, not only of himself, but of his ancestors, apparently applies just as strongly to Sudras as to other Hindus. The only decided case which lends any colour to a distinction in the case of Sudras is that of *Mussamut Tikday* v. *Hurreelall* (1) above referred to. But upon an examination of that case, I have come to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt, the parties in that case were Sudras; and no doubt also this fact is noticed in the judgment, but, in my opinion, for another purpose. The case came up upon appeal fromt he Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nuseebun, but no son. The second wife, Mussamut Tikday, was childless. Mussamut Tikday survived her

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husband; the other wife died in his lifetime. During his lifetime Nowrunghee adopted his grandson, Hurree Lall, the only son of his daughter Nuseebun as a "*kurta*" or "kritima" son. After Nowrunghee's death, Mussamut Tikday brought a suit against Nuseebun and Hurree Lall to recover, as heiress to her husband, certain property which had belonged to him; and it was in this suit that the question arose whether the adoption of Hurree Lall was valid. In the judgment of this Court, the Zillah Judge is stated to have held that, as the family were "Sudras, no exception could be taken to the selection of an only son as a *kurta putro*." I have referred to the judgment of the Zillah Judge, and I do not find that he said this. What he did say was, that a Sudra can adopt his sister's son or daughter's son, and for this there is good authority in the Dattaka Chandrika, Stokes' Hindu Law, 632, where Sudras are specially exempted from the rule which prohibits members of the other classes from adopting a daughter's or a sister's son. But the rule as to *kritima* adoptions is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adoptep child does not cease to belong to the family of his natural father (see Sutherland in Stokes' Hindu Law in the passages already cited), and is not confined to any particular class. In point of fact, the Zillah Judge appears to have overlooked entirely that this was not a regular adoption, but a *kritima* one and relying solely upon the first opinion of Sir W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the *kritima* form, and I have, no doubt, that that was the substantial reason why in this case the adoption of an only son was held to be valid.

It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to the other classes of the community: one instance of relaxation has been just now mentioned; but I think we ought to be careful how we extend the list of such exceptions, and draw distinctions between the classes for which there is no

direct authority in the Hindu law. I do not find the slightest authority in any text-book for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of *Mussamut Tikday* v. *Hurreelall* (1). But, as I have just now stated, I do not think that that decision, so far as it relates to the adoption of an only son, really proceeded upon any distinction between Sudras and other classes, and therefore, upon the ground that this is a general rule from which it is not shown that Sudras are excepted, I think we ought to hold that for all classes of Hindus in Bengal an adoption is invalid wherever the effect of the adoption, if valid, would be to extinguish the lineage of the natural father, and to deprive the ancestors of the natural son of the means of salvation.

GARTH, C. J.—I quite agree in the conclusions arrived at in the very learned judgment of my brother Markby. I think the weight of authority in Bengal is decidely in favour of the invalidity of the adoption of an only son; and I see no sufficient ground for making any distinction in this respect in the case of Sudras.

The appeal will be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the appellant: Baboo *P. C Mookerjee.*

Attorneys for the respondent: Messrs. *Remfry* and *Rogers.*

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APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

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CHUNDER SEKHUR MOOKERJEE AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF MIDNAPORE ON THE PART OF THE GOVERNMENT (DEFENDANT).*

Kabooleut—Specific Performance of, Conditions of—Specific Relief.

One of the terms of a kabooleut, equally binding on the Government and a zemindar, the parties concerned, was as follows: "The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc., in connection with the salt and sweet (*i.e.*, not saline) lands of the said parganna, shall be made by the Government of the Honourable Company." In a suit brought by the zemindar to obtain an order upon the Government to re-excavate and clear the water-passage of a particular khal situate within the parganna, the subject of the kabooleut, *held*, that the case was not one in which the Court would decree specific performance.

THIS was a suit instituted for the purpose of compelling the defendant to re-excavate and clear the water-passage of a certain khal known as the Protabkhali Khal. The plaint alleged that the khal in question, which formed the connecting link between two rivers, had, from the time of the decennial settlement, at which period the plaintiffs' zemindari had been created, been used as the outlet for all the water which accumulated on the plaintiffs' lands, and that the defendant had hitherto excavated the said khal when necessary, in order to keep free the water-passage for such purpose. That, owing to the neglect of the defendant, the khal had become choked with silt, and the flow of water being thereby interrupted, considerable injury had accrued to several mauzas on the plaintiffs' zemindari. The plaint further stated that the defendant had let out in ijára the khal, together with the lands bordering its banks; that the ijáradar had completely stopped the khal and had grown crops thereon. Failing

* Regular Appeal, No. 100 of 1876, against the decree of Baboo Jodu Nath Roy, Subordinate Judge of Zilla Midnapore, dated the 21st of December 1875.

to obtain redress from the Settlement Officer, who, on the 16th October 1873, disallowed the objections made by the plaintiffs and confirmed the ijara, the present suit was instituted on the terms of an agreement entered into between the predecessors of the plaintiffs and the defendant, and embodied in the potta and kabooleut exchanged between the parties. The plaintiffs did not produce the potta, but obtained the kabooleut from the defendant, which was put in as evidence on behalf of the plaintiffs. The material parts of this kabooleut, which was dated the 15th July 1795, are as follows:—"The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc., in connection with the salt and sweet (*i.e.*, not saline) lands of the said parganna, shall be made by Government of the Honorable Company."

The defendant contended that, under the provisions of Bengal Act VI of 1873, the Government are only bound to maintain those embankments which are included in Schedule D. of the Act, and in seeking for a remedy, the only procedure open to the plaintiffs was that afforded in cl. 7, s. 4 of that Act. The Protabkhali Khal, the subject of the suit, was not mentioned specifically in the kabooleut, nor was there anything in the terms of the kabooleut itself to prevent the operation of the above-mentioned Act in respect of the plaintiffs' zemindari. The defendant further alleged in his written statement that long before the permanent settlement, the Protabkhali Khal was used as a canal for the purpose of conveying salt, and salt golas stood on both banks of the khal. When the Government gave up the salt manufacture in the said parganna, the question whether it was necessary to re-excavate the khal aforesaid was taken into consideration by the Department of Public Works, and the Lieutenant-Governor in his letter, dated 15th December 1863, held that the khal should be left to silt up. In the face of this finding, the defendant contended that the plaintiffs had no cause of action. The defendant also pleaded limitation

The Court of first instance found on the evidence that the Protabkhali Khal had been in existence for a long time, and was main-

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tained by the Government for the passage of boats carrying salt which was made at their salt manufactory. The plaintiffs admitted that they did not base their present suit on any prescriptive right, and even if this contention had been raised, it was barred by limitation, two years having elapsed from the date of the first encroachment made on such right by the defendant. After careful consideration of the clause of the kabooleut already quoted, the Court was of opinion that the terms of such clause were too general to be construed strictly against the defendant. Part of the judgment was as follows:—"Government, as the paramount power responsible for the life and property of its subjects, can at any time determine whether the construction of any khals and embankments is conducive to their interests, and they have this general power extending all over the country, and I believe the general power was accorded to Government by the terms of the kabooleut. I do not think that under the terms of the kabooleut every embankment or khal for the drainage of this zemindari must be constructed or maintained by the Government. It was no doubt intended that Government will determine which khal to maintain, or which not to maintain, on consideration of the existing state of the country and all the circumstances which may be brought to its notice; but if the Government chose, on consideration of all matters and the then state of the country, not to maintain the khal, I do not think it can be compelled by a Court of Justice to re-excavate it, merely because it has now turned out a fact, that it would have been more beneficial to the zemindari and its subjects if it were not closed. To my mind it appears that with the determination of Government, who acted with the advice and opinion of its responsible officers with regard to this khal, the Court ought not to interfere; the Court should only see whether there was an agreement between the plaintiffs and defendant, binding the latter to maintain this khal or to excavate it; but I do not see any such agreement. The general terms relied upon by the plaintiffs do not, I think, give them any right which may be awarded to them, for compelling Government to re-excavate the khal which was hitherto maintained by it only for its own purposes. The evidence of the plaintiffs' witnesses,

which remains unrebutted, proves, it is true, that since the bed of the khal has silted up, the ryots have suffered much both in their health and their property: if that be the fact, which I dare say it is, the plaintiffs ought to move the Government through the proper channel to make necessary arrangements for the drainage of the surplus water of the zemindari, and their application, if made, must receive due and proper consideration at his hands; but their present suit to compel Government to excavate this khal in the absence of any agreement must fail."

The plaintiffs appealed to the High Court.

Baboo *Gopal Lall Mitter* and Baboo *Sham Lall Mitter* for the appellants.

Baboo *Unnoda Persaud Banerjee* for the respondent was not called upon by the Court.

The judgment of the Court was delivered by

JACKSON, J.—We do not think it necessary to call upon the Government vakeel in this case, because we are of opinion that the judgment of the Court below is substantially correct. The terms of the kabooleut, which were read to us from page 7 of the paper-book, and which, it may be admitted, are binding on the Government as well as the zemindar, are extremely vague, and it would be dangerous to impose upon the Government, on the strength of such terms as "the excavation of the silt of khals, the closing of the mouth of Khalsai," so extremely onerous an obligation as the plaintiffs seek to impose in the present case. But in addition to that there is an objection on principle to requiring the Government, or any person whom it is sought to bind by such words, not to do that which may, upon a proper consideration of the whole subject, carry out the purpose obviously intended, but to do a particular thing, because that particular thing was once done in view of that same object. The Government, no doubt, undertook in this agreement between it and the zemindar to retain in its own hands the construction of certain khals and other things, and partly in consideration of that agreement, and partly in consideration of its duty as paramount

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power, the Government would, no doubt, be desirous of taking all steps that may be necessary for the object with a view to the comfort and health of the population. But it is a very different thing to seek to compel Government by a plaint filed in Court to maintain a particular khal in a certain position. Nor has the Court before it, as it seems to me, any materials upon which it could make any specific order such as it would have to make in order to be of use to the plaintiffs, because the Court has no means of ascertaining at what depth and width it would be necessary to maintain this khal for the purpose of effectual drainage of the plaintiffs' estate. These are general observations which appear to me necessary to be made; but it also seems to me that the policy of the law, even before the Specific Relief Act, was against the enforcement of specific performance of contracts of this nature. It is not necessary for us to say what relief, if any, the plaintiffs would be entitled to. Under the circumstances, I think it quite clear that they could not succeed in the present suit, and that the suit was properly dismissed by the Court below. The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

CHUNDER CAUNT MOOKERJEE (DEFENDANT) *v.* JODOONATH KHAN AND ANOTHER (PLAINTIFFS).

1878 *Jany.* 30 & 31.

Costs—Tender—Difference between a Tender made on account of separable Claims and one made on reference to part of a single inseparable Claim—What is not an unconditional Tender.

In a suit to recover Rs. 1,323-15-6, the balance of the price of goods sold, on which an account had been come to between the parties, it appeared that the defendant had tendered before suit a sum of Rs. 1,043-5, stating in the letter of tender that the sum so tendered was the only sum due. At the trial the plaintiff obtained a decree for the full amount claimed by him. *Held*, both in the Court below and on appeal that the tender was bad, and therefore the plaintiffs were entitled to their costs.

Held per KENNEDY, J.—That the tender was bad, being a tender of part of an entire debt.

Held per GARTH, C.J. (MARKBY, J., concurring, that the tender was also bad, as the plaintiffs could not have accepted the sum tendered without giving up the remainder of their claim.

The plaintiffs in this case sued the defendant to recover a balance of Rs. 1,323-15-6 due to them in respect of 2,000 packets of ginger sold and delivered to the defendant in the course of the months of December 1876 and January, 1877.

The plaintiffs alleged that of the 2,000 packets of ginger, one thousand were to be paid for at the rate of Rs. 7-8-6 per maund, and the other thousand at the rate of Rs. 8-8-6 per maund.

The defendant, on the other hand, contended that the whole 2,000 packets were to be paid for at the uniform rate of Rs. 7-8-6 per maund. Certain payments on account and deductions that had been agreed to were admitted on both sides. Before the institution of the suit, the defendant tendered to the plaintiffs the sum of Rs. 1,043-5 by a letter which was as follows:

7½, Hastings Street, Calcutta, 30th January 1877.

MESSRS. GHOSE and BOSE,

Re Ginger sold.

DEAR SIRS,

WITH reference to your letter of the 29th instant (demanding payment of Rs. 1,323-15-6, which I referred to my client; and in reply he instructs me to state that there is only due to your clients in respect of the ginger sold by them to him the sum of Rs. 1,043-5, which amount I hereby tender to you.

Yours faithfully,

A. ST. JOHN CARRUTHERS.

The plaintiffs having refused this offer and instituted this suit, the defendant pleaded that he had already tendered the amount due to the plaintiffs, and paid Rs. 1,043-5 into Court.

The only issue of fact between the parties was, whether the sum due to the plaintiffs was Rs. 1,323-15-6 or Rs. 1,043-5; and the Court (Kennedy, J.) having found this in favour of the plaintiffs, Mr. *J. D. Bell* (with him Mr. *Allen*) for the defendant, contended that the plaintiffs were not entitled to any costs, as when the

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tender of Rs. 1,043-5 was made to them, they should have accepted it and sued for any further sum claimed by them in the Calcutta Small Cause Court. Mr. Bell further contended that the defendant was entitled to have awarded to him the extra costs to which he had been put by reason of the action having been brought in the High Court, and cited *James* v. *Vane* (1).

Mr. *Bonnerjee* (with him Mr. *Palit*), for the plaintiffs, contended that Mr. Carruthers' letter of 30th January 1877, was not an unconditional tender which the plaintiffs could have accepted without waiving any further claim on their part, and further that a tender of part of an entire claim was bad—*Dixon* v. *Clark* (2).

KENNEDY, J.—I do not think that, looking at the terms of the Small Cause Court Acts, this is a case in which this Court should exercise its discretion. The provisions in Act XXVI of 1864, s. 9, are very peculiar, and only give a right to certify that the action was a fit one to be brought in the Supreme Court "by reason of the difficulty, novelty, or general importance of the case, or of some erroneous course of decision in like cases in the Court of Small Cause."

Now, I cannot say that this case is a novel one, nor is it one in which there is any difficulty or general importance. It seemed to me a tolerably plain case on the evidence. I must therefore consider whether the case cited by Mr. Bell—of *James* v. *Vane* (1)—governs the present case. Now that case was very much determined, as far as I can see, on the construction of rules of that Court which are not applicable here. But Cockburn, C.J., expressly rested his decision on this, that there was a distinction between a case where one inseparable claim was made and a case where the amount was made up of several separable items, and held that the case came under the latter class of cases. He says,—"Where a plaintiff claims an amount which is the result of one demand, and which cannot be separated, he may say to the defendant, when a smaller sum is tendered to him, I will not take less than the whole sum which I claim; but where the whole demand is made up of an aggregate of items,

(1) 29 L. J., Q. B., 169. (2) 5 C. B., 365.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

MONOHUR DOSS (DEFENDANT) *v.* ROMANAUTH LAW (PLAINTIFF).

1878 *Jany. 29 & 30, and March 12.*

Attorney and Client—Fiduciary Relationship—Compound Interest—Rate of Interest—Taxation of Bills of Costs—Interest on Costs

The plaintiff, an attorney of the High Court, made advances to the defendant, a banker and merchant, for whom he had been, and was then acting, in certain litigation, in which the defendant was engaged in the High Court. At the time of the first loan in 1869, the defendant was considerably indebted, and one creditor had issued execution against his property, and he also owed the plaintiff a large sum for costs, for which, however, up to that time, no bills of costs had been delivered. Before the first loan the plaintiff delivered bills for all his costs then due, of which some were incurred in completed, and others in pending, suits, and offered to have them taxed; but the defendant then said there was no need for taxation, which would only increase his expenses. The advances were made on the security of mortgages executed by the defendant. The first was executed in August 1869, and the principal was repayable in February 1871. Interest was to be payable at 12 per cent. per annum, and compound interest at the same rate was also to be charged on all interest in arrear. In September 1870, a further advance on the same terms was made; and a further mortgage executed, which included the original sum, with the interest then due, and the further advance. Further advances were made in the same way in October 1871 and March 1876. In all these transactions the defendant had no independent professional advice, and the mortgages were prepared in the plaintiff's office, but not charged for. In a suit to recover the sum due on the mortgages by sale of the mortgaged property, the plaintiff abandoned any accumulation of interest since the date of the third mortgage *Held*, that the defendant, notwithstanding he had declined the offer of the plaintiff in 1869 to tax the bills, and notwithstanding the delay that had taken place, was entitled (having regard to the relation between the parties, and to the fact that a portion of the costs was incurred in suits then pending) to have the bills taxed and to re-open the account. Under the circumstances, the Court would not infer acquiescence from the delay on the part of the defendant, nor did the plaintiff's offer to tax, and the defendant's refusal of that offer, debar the defendant of his right to have the bills taxed in the usual way. *Held* also, that there is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payment of costs which have actually become due, and that the plaintiff was entitled to sale of the property, to accumulations of interest prior to the date of the third mortgage calculated by allowing annual rests, to interest at 10 per cent. as being a fair rate for the client to have undertaken to pay when the mortgages were executed, and to interest on his costs.

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APPEAL from a decision of Kennedy, J., dated the 20th of August 1877.

In this case it appeared that, about the year 1864, the plaintiff, a member of a firm of attorneys practising in Calcutta, began to act as the attorney of the defendant, who was engaged in considerable litigation in the High Court, chiefly relating to family matters. The defendant was a native banker and merchant in the bazar. In the year 1868, the plaintiff obtained for the defendant a loan of Rs. 12,000, or thereabouts, on mortgage, at the rate of 12 per cent., from two persons of the name of Gangooly. This loan was repayable at the end of a year. About the time that this mortgage was falling due, the defendant expressed his desire to obtain a larger loan upon the same property. The defendant at this time was in some difficulties about money; he had debts to a considerable amount, and one creditor had issued execution against his property. The plaintiff's firm had also an unsettled claim against him for upwards of Rs. 23,000 for costs, which they had called upon him to settle. The plaintiff applied to the Gangoolys, but they refused to make any further advance, and the plaintiff then agreed to advance the money himself. The plaintiff had not up to that time delivered any bills of costs. But he made out and delivered at that time bills for all his costs due up to that date, in all forty-six bills of costs. He also delivered a general account showing all that was then due for costs. And the plaintiff offered to tax such of the bills as were taxable, but the defendant said there was no necessity for it, as the costs of taxation would only increase his expenses. The sum of Rs. 34,000 was then advanced in mortgage by the plaintiff to the defendant, out of which defendant discharged a number of his liabilities, including the plaintiff's costs. The larger portion of these costs had been incurred in suits then completed, but some portion were costs incurred in suits still pending.

The mortgage to the plaintiff was executed on the 17th August 1869. The rate of interest was 12 per cent. per annum, payable quarterly; and the principal was repayable on the 17th February 1871. Compound interest was also to be charged upon all interest in arrear at the rate of 12 per cent.

In September 1870, the defendant required a further sum of Rs. 2,546 to pay off some claims upon him; and Rs. 4,454 was then due to the plaintiff for arrears of interest, exclusive of compound interest, on the first mortgage.

Thereupon the plaintiff made the defendant the further advance which he required, and the defendant executed a fresh mortgage in favour of the plaintiff, dated 28th September 1870, for Rs. 41,000,—that is, the original Rs. 34,000, the interest, and the further advance,—upon the same terms as to interest as were contained in the first mortgage. The debt thus secured fell due on the 28th September 1871.

On the 13th October 1871, the defendant executed a third mortgage for Rs. 48,138, of which Rs. 2,000 was a further advance, Rs. 5,138 for interest (exclusive of compound interest), which had accrued under the second mortgage, and Rs. 41,000 the previous debt; the terms as to interest being the same in the third mortgage as in the two previous mortgages.

On this mortgage a sum of Rs. 239 was paid by the defendant to the plaintiff for interest, but at what date is not stated. In 1875, the plaintiff made the defendant further advances amounting to Rs. 3,600, and in March 1876 an instrument of further charge upon the same property, and upon the same terms as to interest, to secure this Rs. 3,600, was executed by the defendant.

The present suit was brought, asking for a sale of the mortgaged property to satisfy these claims. The mortgaged property was stated by the plaintiff to be of the value of Rs. 90,000, and the amount of the defendant's debts to the plaintiff under the two mortgages to be about Rs. 95,000.

All these mortgages were prepared in the plaintiff's office, but they were not charged for. It was admitted, that the defendant in these transactions had no independent professional advice. The plaintiff was the general professional adviser of the defendant, until the time when the present suit was brought.

The defendant, in his written statement filed in this suit, objected to the rate of interest as too high, and also stated that, since the institution of the suit, he had had the bills of costs

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examined, and had discovered that a great number of the charges were improper; and in particular, that one bill, which had been taxed, and had been reduced in taxation by Rs. 71-6-0, was, nevertheless, put into the account of costs made out by the plaintiff in August 1869, at the amount at which it originally stood before taxation.

The plaintiff gave no evidence to explain how it was that this sum of Rs. 71-6-0, which had been clearly taxed off the bill, was included in the account.

Mr. *J. D. Bell* and Mr. *Bonnerjee* for the plaintiff.

Mr. *Jackson* and Mr. *Stokoe* for the defendant.

KENNEDY, J.—I do not feel much difficulty in this case. It is not like the case of a sale, for there are so many elements to be considered, that a solicitor who purchases from his client stands no doubt in a very different position; and if there is any doubt as to the propriety or wisdom of the transaction in those cases, the client will be entitled to get back his property, and the attorney his money with interest, and will have to account for rents. This is something quite different. Here the attorney is only lending money, and all he wants is to get it back again. He has clearly a right to get it back with interest, and the only question here is, how much interest.

Now we have the best possible evidence in this case as to the reasonable rate of interest; not speculative statements like those of Shamole Dhone Dutt. We have evidence of what within a year before was actually paid by the defendant, a native banker, a man whose dealings were in money, and who was not without friends, and was aided by the advice of Baboo Romanauth Law, who is not easily to be imposed on, or without zeal, for his clients. And when we find that Monohur Doss, advised by Romanauth Law, within a year before actually took a very much smaller sum on the same security at 12 per cent., I think I must take this to be the best evidence we can have of the proper rate to be paid for the money to be lent, as there is no change of circumstances alleged or proved. I think it is conclusive to show, that if Romanauth Law had been advising

his client Monohur Doss in his dealing with an adverse lender, he could have advised him to accept the terms of this mortgage copied as they are from the prior one. I could understand the defendant making the case he does if he were prepared to allege and prove that Romanauth Law had, with a view of making a loan at a future period, and with the intention of manufacturing evidence, which would then be useful to him, while professedly advising Monohur Doss as his solicitor, permitted the money to be lent at too high a rate, and on too onerous stipulations; but the defendant has not even suggested such a case, much less proved it; and unless I am prepared without proof, and without pleading, to fix a most respectable attorney of this Court, Romanauth Law, with such manufacture of evidence, which of course would be an atrocious fraud, and would probably render it necessary to take proceedings against him as an officer of the Court, I cannot resist the evidence given by the fact that the defendant, a banker, with a most able attorney concurring, had within a year raised a loan at that rate. With respect to the provision for the accumulation of interest, the plaintiff does not seek to enforce it; and I think he is therein acting wisely and generously; but I am not by any means sure whether, having regard to the fact that the previous mortgage contained this provision, I ought not to have permitted it, if the plaintiff had insisted on it; but of course the plaintiff is at liberty to waive if he thinks fit.

We have in the prior mortgage in this respect also the best evidence that Romanauth Law was, in dealing with his client, performing the duty which the authorities lay down as the measure of the duty of an attorney who does not throw his client into other hands. It is the best possible evidence that he took the same precautions when lender, as he would have done when his client was dealing with another.

With respect to the account stated, I think the cases do go far enough for me to say that there having been no taxation and independent examination, the bills are not absolutely binding on the defendant. But he has lain by for six or seven years; and under these circumstances I think that the true principle is to permit the bills to be taxed in the ordinary way; but

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the items are to be taken as representing money paid and work done, and if in any case it appears the charges are unreasonable or improper, to that extent they must be disallowed.

Then we have the new mortgages. Now one of the strongest reasons occurring to me for saying that a provision for compound interest is one which, if not absolutely illegal, ought to be discouraged, is that by a self-acting machinery it silently piles up a load of debt on the unfortunate borrower without calling his attention to the increasing difficulties of his position; so that if he be not an active and careful man, and such men as a rule are rather lenders than borrowers, he finds the whole value of his property absorbed by the silent increase of his debt. But because such a provision ought to be discouraged it does not follow that parties ought invariably to lose accruing interest on sums due. It seems the fairest transaction in the world that at reasonable times a mortgagee should call on his mortgagor to pay him his interest, or if he will not or cannot do this, to turn it into principal: and this specially applies when the mortgagor is getting a fresh advance. The dicta in *Lawless* v. *Mansfield* (1), on which Mr. Jackson so much relied, do not seem to have decided anything, for there was no decision on the point; and further, one cannot fail to see that *Lawless* v. *Mansfield* (1) does not commend itself to the highest judicial authorities. In *Blagrave* v. *Routh* (2), *Lawless* v. *Mansfield* (1) was pointed out to be in the matter decided perfectly correct, but it was evident that the Court disapproved of some of the observations made by Lord St. Leonards, and the actual decision there does not touch this case. So far as the subsequent instrument, the plaintiff is entitled to have the interest calculated, on the consolidated sums, with rests at the times when the deeds were respectively executed. I understand Mr. Bell to express his willingness to waive accumulation of interest on the amounts due for the balance of costs; that can be ascertained, and so much must be reduced. I think the proper decree will be for a sale. As to a receiver, it being stated that there is danger of the property being deficient, there must be a receiver; but I

(1) 1 Dru. & War., 557.

(2) 8 De Gex M. and G., 620; S. C., 2 Kay & J., 509.

understand the plaintiff is not unwilling that the rents, subject to any necessary expenditure for repairs, should be paid over to the defendant. The proper order will be to reserve leave to the defendant to apply for payment to him of any sums received. If I were now to give any direction as to the payment, the receiver might be placed in some difficulty by having to determine what repairs are necessary. Costs on scale 2 to be added to the amount found due on taking the accounts.

From this decision the defendant appealed, on the grounds that the plaintiff was only entitled to the amount of his bill of costs, when duly taxed, plus the amount actually advanced by him; that the amount of his bill of costs should, in no case, carry compound interest; that the plaintiff was not entitled, by the plan of striking balances and taking securities on such balances, to charge, what really was, interest on interest; and that the rate of interest, 12 per cent., charged, was an improper one on the evidence before him, having regard to the position in which the plaintiff stood towards the defendant.

Mr. *Jackson* for the appellant.

Mr. *J. D. Bell* and Mr. *Bonnerjee* for the respondent.

The following cases and authorities were referred to:—*Lawless* v. *Mansfield* (1), *Blagrave* v. *Routh* (2), *Waters* v. *Taylor* (3), *In re Foster, Ex parte Walker* (4), *Howell* v. *Edmunds* (5), *Crossley* v. *Parker* (6), *Walmsley* v. *Booth* (7), *Draper's Company* v. *Davis* (8), *Gibson* v. *Jeyes* (9), *Rhodes* v. *Bate* (10), *Lyddon* v. *Moss* (11), *The Land Mortgage Bank of India* v. *Baboo Soorjo Prokash Singh* (12), and *Moss* v. *Bainbrigge* (13).

Cur. adv. vult.

(1) 1 Dru. & War., 557.
(2) 2 Kay & J., 509; S C on appeal, 8 De Gex M. & G., 620.
(3) 2 Myl. & Cr., 526.
(4) 2 De Gex., F. & J., 105.
(5) 4 Russ., 67.
(6) 1 Jac. & W., 460.
(7) 2 Atk., 25.
(8) 2 Atk., 295.
(9) 6 Ves., 266.
(10) L. R., 1 Ch. Ap., 252.
(11) 4 De Gex. & J., 104, at p. 130; S. C., 5 Jur., N. S., 637.
(12) 25 W. R., 323.
(13) 18 Beavan, 478.

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The judgment of the Court (Garth, C. J., and Markby, J.) was delivered by

GARTH, C. J. (who, after stating the facts as above, continued):—The defendant does not deny the plaintiff's general right to an account of what is due under the mortgages, and to have the property sold; but he maintains (1) that he ought not to pay compound interest, (2) that the bills of costs delivered in 1869 ought to be taxed, and (3) that the rate of interest was too high, and ought to be reduced.

Before proceeding to deal with these particular questions, we may say generally, that there is no reason whatever to suppose that the plaintiff intended to act dishonestly towards his client. The plaintiff had no doubt satisfied himself in his own mind, that if his client went elsewhere to borrow the money, he would not, on the whole, be so well off. We are quite willing to presume this in favor of an attorney of long standing and high character, such as the plaintiff is here. But, for the purposes of this suit, the question is, whether, having regard to the fiduciary relation between the parties, and the rule which the Court always observes in transactions between attorney and client, the plaintiff's contention here is well founded.

First, then, as to the interest. The plaintiff abandoned in the lower Court the claim to any accumulation of interest since the date of the third mortgage; but he maintains that he is entitled to the prior accumulation of interest included in the mortgages of 1870 and 1871. The defendant desires to get rid of all accumulations of interest, and to have the whole account taken from the date of the first mortgage at simple interest. The learned Judge in the Court below has given the plaintiff the accumulations of interest prior to the third mortgage; and, subject to the question of the rate of interest which we shall consider hereafter, we think rightly so. If the debt be really due, and the rate of interest be a fair one (which are wholly separate questions), it would be quite unreasonable that the debtor should pay no interest for many years, and that the creditor should be kept all that time out of his interest without any compensation.

We do not for a moment doubt the power of the Court to consider this part of the agreement, and to see whether, as between attorney and client, the client ought to be bound by it. But the plaintiff is entitled to a reasonable compensation for the default of the defendant in not paying interest regularly, and, upon the whole, we do not consider, now that he has abandoned the compound interest, that in insisting upon annual rests up to the date of the third mortgage, he is claiming more than a reasonable compensation, if the rate of interest be fair. It was contended that under no circumstances could an attorney be allowed interest on costs. But the authorities which were relied upon in support of that contention do not apply to a case like the present. There is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payments of costs which have actually become due, or from agreeing for any fair amount of interest in making such an arrangement. *Lyddon* v. *Moss* (1), cited by Mr. Jackson, is certainly no authority in his favor; there the stipulation to which Lord Justice Turner's remarks are applicable, was a stipulation for interest on future costs, which stands on a wholly different footing.

We now proceed to consider the question as to the rate of interest. It was admitted in the course of the argument—at any rate it appears to us to be beyond dispute—that the attorney, who has lent money to his client upon mortgage, can only recover what would have been a fair rate of interest for his client to have undertaken to pay. We have, therefore, to consider whether 12 per cent. was a fair rate in 1869, 1870, and 1871, when the three mortgages were executed. The case is, no doubt, very bare of evidence upon that point. The plaintiff called no witnesses upon it; he was cross-examined as to it by the defendant's counsel, but no information which can assist us in coming to a conclusion was elicited from him. One of the plaintiff's witnesses, however, Baboo Shamole Dhun Dutt, an attorney of this Court, and who states that he had considerable experience in lending money upon mortgage, gave evidence, the

(1) 4 De Gex. & J., 104, at p. 130; S. C., 5 Jur., N. S., 637.

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result of which appears to be, that the security being admittedly ample, and the property favourably situated, the defendant could have got the money at 10 per cent. at the outside. Now this evidence, it must be borne in mind, comes from the plaintiff's own witness. It is affirmative evidence, given by a person of unimpeachable credit upon a matter within his experience. It was tested by the plaintiff's counsel on re-examination, and was not modified in any material particular. It is, therefore, such evidence as in the absence of good evidence to the contrary, we are bound to accept as credible. It was suggested that as the defendant was himself a banker, he probably knew the rate of interest as well as the plaintiff, but this is not the case. The defendant is an up-country banker and merchant, accustomed, no doubt, to advance money on goods, but not likely to be acquainted with the customary rate of interest upon mortgages of immoveable property in Calcutta, with which, in the ordinary course of business, he would have but little to do.

The learned Judge in the Court below thought that this evidence of Baboo Shamole Dhone Dutt as to the rate of interest was completely answered by the transaction between the defendant and the Gangoolys, which he considered to be conclusive to show that 12 per cent. was a fair rate. Possibly, under one or other of the very general provisions of the Evidence Act, evidence of this transaction would have been admissible evidence for this purpose, at any rate it was not objected to, and we must take it for what it is worth. But we are bound to say, that we are very far from thinking it conclusive to show that the rate charged in another and subsequent transaction was the current rate. An isolated transaction can never, as it seems to us, be conclusive as to current rates: it certainly does not, in our opinion, displace the evidence of a man of experience and unimpeachable credit, such as the plaintiff's own witness, Shamole Dhone Dutt.

The remaining question, and the most difficult one, is as to the re-opening the bills of costs. The learned Judge in the Court below was of opinion, that, notwithstanding the settlement of accounts in 1869, the bills ought to be examined by the taxing officer; but, considering the long time that had elapsed since

they had been delivered, he thought that the plaintiff ought not to be put to any proof that the work was done. He thought that the taxing officer should only disallow those charges which appears to him unreasonable and improper.

The first question here is, whether the defendant had any right to have these bills taxed at all after the mortgage of 1869, and what passed upon the negotiations for the mortgage executed in that year. The plaintiff's counsel contends, that when the plaintiff had offered to have the bills taxed, and the defendant refused that offer, the defendant was debarred from any further right to have the bills taxed. Further he contends, that the defendant has lain by so long since the bills were delivered, that any right he may have had to re-open the account made up in 1869 has been lost by delay and acquiescence.

We think that, having regard to the relation between the parties, there is no sufficient ground for the plaintiff's contention in this respect. When the account of 1869 was made up, the plaintiff was the defendant's attorney, and a portion of the bills of costs which he was then called upon to pay, though only the smaller portion, related to suits then pending. Subsequent to that account being then made up, the plaintiff, besides being the defendant's attorney, became his arbitrator in a very heavy reference, made in a suit wherein the defendant was a party. During all the time, therefore, that has elapsed since the bills were delivered, the defendant has stood in such a relation to the plaintiff, that he can scarcely have been called a free agent. Of course also during all that time the plaintiff enjoyed the full confidence of the defendant; and the defendant was under the impression, that the only effect of having the bills of costs taxed would be to increase his own indebtedness. Practically, he could not, since 1869, have taken any step at all in the matter without quarrelling with his own attorney, and we do not think that, under such circumstances, we ought to infer acquiescence from the delay.

Nor are we satisfied that by the bare offer to have the bills taxed, and the rejection by the defendant of that offer, the defendant has lost that right, which he originally had, to have

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the bills taxed. We cannot now say what the result of a taxation would have been. Possibly it might have been advantageous to the defendant, possibly not. But we think it would be dangerous if we were to sanction the notion that an attorney, by making such an offer as this to his client at a time when the client was in difficulties, and he was just about to lend the client money, put himself in any better position. We think that, as between attorney and client, such an offer ought to carry very little weight. We do not at all intend to say, that the offer was not in this case made *bonâ fide;* but, under all the circumstances, we do not think the refusal of it ought to deprive the defendant of his right to tax.

It was suggested that if we sent these bills to be taxed in the ordinary way, the defendant might be put in a much better position than he would have been if he had had them taxed in 1869, some of the bills being for work done in 1864 and 1865 in suits long ago concluded; so that it might be extremely difficult for the plaintiff now to prove every item in these bills. We do not apprehend any real difficulty upon this point, having regard to the practice which we understand to prevail in the Taxing Master's office.

The lapse of time is a circumstance which, like any other circumstance, the Registrar would take into consideration, and if his decision should not be satisfactory in any particular case, the parties will be at liberty to object to it, and the matter will then be referred to the opinion of the Court.

The decree of Mr. Justice Kennedy will, therefore, be varied by directing that, in taking the account upon the mortgages, interest be calculated at 10 per cent. in lieu of the rate mentioned in the mortgages; the account up to 13th October 1871 being made up with annual rests, and that the plaintiff's bills of costs be taxed in the usual way. In all other respects the decree will be affirmed.

As regards costs, we think the defendant is entitled to have the costs of this appeal on scale 2. If the defendant had been challenging these transactions as plaintiff, he would have got his costs, as having substantially succeeded: and we do not see how his position is practically altered because he happens to be

a defendant. He has also succeeded in the appeal. The costs subsequent to the decree, other than the costs of taxation, will be added to the amount found to be due in the usual way. The costs of taxation will follow the result of the taxation according to the rule.

Six months' time will be allowed from the date of the decree for taxing the accounts.

Decree varied.

Attorneys for the appellant: Messrs. *Mitter* and *Bhanjo.*

The respondent in person.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

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Jany. 8 & 9, *and Feby.* 11.

Divorce Act (Act IV of 1869)—*Suit for Dissolution of Marriage—Adultery—Desertion.*

In a suit by a wife for a dissolution of her marriage on the ground of her husband's adultery and desertion, the adultery was proved, and it was found that the wife, notwithstanding the gross misconduct of her husband, continued to live with him for some years, during which time she supported her husband and herself by her own earnings, he contributing nothing to her support; that eventually, under the pressure of pecuniary difficulties brought about by her husband's extravagance and dissolute habits, they came to an arrangement, by which she went to live with her friends and he resided at his mother's house, until they could again find means to provide a common house; that for two years previously to the separation, though they had lived together, no conjugal intercourse owing to the husband's misconduct had taken place between them; that he left his mother's house without telling his wife where he was going, and subsequently went to Madras, where he had since resided. *Held* in the Court below, following the case of *Fitzgerald* v. *Fitzgerald* (1), that the separation having originally been by mutual consent, desertion could not take place until cohabitation had been resumed; desertion not being proved, the wife was only entitled to a decree for judicial separation. *Held* in appeal that the separation not being brought about by the act of the wife, but by the husband's misconduct, distinguished the case from that of *Fitzgerald* v. *Fitzgerald* (1), and that, under the circumstances, the desertion was

(1) L. R., 1 P & D., 694.

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proved, and the petitioner was entitled to a decree for a dissolution of marriage.

APPEAL from a decree of Kennedy, J., dated the 15th August 1877.

This was a suit brought by a wife for a dissolution of marriage on the ground of her husband's adultery and desertion. The suit was heard as an undefended case, and at the hearing, the adultery, which was alleged to have been committed in 1864 and 1869 in Calcutta, and in 1875 at Madras, was fully proved; but the learned Judge did not consider the desertion to be established, and gave a decree only for a judicial separation.

The parties were married in 1856, and lived together until 1871; but since 1869, the respondent had not contributed to his wife's support, and she had maintained herself and him by keeping pupils; she and her husband residing in Joratallao Street until 1870, when a distress having been put in for rent, they left and went to live in Circular Road; but pecuniary pressure forced them to give up that house, and by arrangement between them, she went to live with her family in Calcutta, and he to his mother's in Calcutta. The petitioner stated that, for two years previously to February 1871, the respondent had ceased to have conjugal intercourse with her. The alleged desertion was stated to have taken place in March 1872, when he left Calcutta without seeing or having any communication with his wife, or making any provision for her support. The suit was brought in 1877. The evidence of the petitioner as to the desertion when the case first came on for hearing was as follows:

"I was married in September 1856. After my marriage we lived at 22, Park Street. I continued to live with my husband up to 1869. I lived under the same roof with him up to 9th February 1871. I continued to live with him under the same roof, but not as his wife. That was at 17, Joratallao Street. He had been gradually withdrawing himself for many years from my society, and my own self-respect forbade I should do more than live under the same roof. We lived for two years under the same roof, but not as husband and wife. I made repeated endeavours, both by letter and in person, to induce him to

return to me. I went from Joratallao Street to the house in Circular Road in consequence of a distress in the house. I lived in Circular Road for ten months. He lived in that house all the time. From Circular Road I returned to my family. I did so with his consent, simply because we were getting more and more involved, and he made so many demands on me for money which I could not meet. I understood he was going to his mother according to a previous arrangement, but just before leaving, he told me he would not go there, and refused to tell me where he was going. He did not ask me to go with him. He left Calcutta in March 1872. In the interval he did not endeavour to contribute to my support. I have seen him since in passing, but not to speak; once at the King of Oudh's menagerie, but not to speak to. It was about a year after in one of his visits to Calcutta. He did not come and speak to me. He has not since contributed to my support in the slightest degree. I have never offered to go and live with him where he now is, because I expected the offer from him. I could not thrust myself on him after the way in which he behaved. I have never requested or written to him to return and cohabit with me. After he had neglected me so long, I could not do so."

On this evidence it was contended by Mr. Jackson and Mr. Trevelyan for the petitioner, that desertion had been made out, and the cases were cited which are referred to in the following judgment:—

KENNEDY, J.—I am very much afraid I cannot give this lady the relief she seeks. On her own showing there never was a time at which desertion could be said to have commenced. It is not necessary for me to express my opinion of the respondent's conduct, the unfortunate lady seems to have had much to complain of, but differences arose and conjugal intercouse, we are told, ceased two years before that, which amounted to a separation. No doubt they seem to have lived very unhappily together. Eventually circumstances occurred, which compelled the husband to live apart with her consent. In fact, unless on an undertaking of better behaviour, or the husband seeking to

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induce her to return to cohabitation, she did not seem anxious to return to cohabitation. She did not write, she says, because it was his part to have first written, and she did not seek to return. The cases cited were very strong, but of very great peculiarity. I think we have got the true principle laid down in *Fitzgerald* v. *Fitzgerald* (1) and *Ward* v. *Ward* (2). In *Fitzgerald* v. *Fitzgerald* (1), in which the conduct of the husband seems to have been as bad as bad could be, the principle is laid down in the *placitum* that "no one can desert who does not actually and willingly bring to an end existing state of cohabitation. If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home have been resumed. The refusal by either of the request of the other to resume conjugal relations does not constitute the offence of desertion."

Therefore, the suggestion I threw out in the argument of converting the original separation into desertion by a requisition to resume conjugal relations would seem not to be well founded law. In the case of *Fitzgerald* v. *Fitzgerald* (1) the facts were as bad as anything could be. That *placitum* seems fully borne out by the judgment of the Court. The Judge Ordinary says: "Putting the facts in the most favorable light for Mrs. Fitzgerald, it would, I presume, be argued thus after the first suit was at an end. Major Fitzgerald might at any time have demanded cohabitation of his wife. She was not unwilling to return to him, and if she had been, the law would have compelled her; but he made no such demand, therefore he wilfully kept apart from her, therefore he deserted her. If, indeed, keeping apart from a wife who has voluntarily quitted her husband against his will, and withdrawn from cohabitation, is the same thing as deserting her, the argument must prevail. But I cannot think that it is. It is one thing to make a breach, it is another to refrain from attempts to heal it. Desertion means abandonment, and implies an active withdrawal from a

(1) L. R., 1 P. & D., 694. (2) 1 Swab. & Trist., 185.

cohabitation that exists. The word carries with it an idea of forsaking or leaving; is hardly satisfied by the negative position of standing apart."

There was a rehearing applied for. The Court retained the same opinion as before. We thus have it established that no one can desert who does not actively and wilfully bring to an end an existing state of cohabitation, which certainly does not seem to have occurred. Possibly it might be held, under the circumstances of this case, that a call to renew cohabitation might convert the separation into desertion, but I think it would be dangerous for the petitioner to try it, as, if acceded to, it would certainly condone the prior offences, and disentitle this unfortunate lady even to judicial separation. In *Ward* v. *Ward* (1), Cockburn, C. J., and the Judge Ordinary were sitting together. Cockburn, C. J., says, the evidence raises a doubt as to the desertion. If disagreements and quarrels took place, and both parties were bound over to keep the peace, can you treat a subsequent separation as desertion? Suppose an arrangement had been made by the advice of the Police Magistrate to separate by mutual consent. Though the husband may have left her, yet if there were a corresponding animus on the part of the wife, if she were a party to his leaving and consented to it, that would not constitute desertion. The act of desertion must be done against the will of the wife.

Again, there is the case of *Townsend* v. *Townsend* (2), where the original separation being involuntary in consequence of fear of arrest, it was held not to be a desertion. Here it was involuntary from want of means, and in consequence of that pressure assented to by the petitioner. I think, therefore, that having regard to those decisions I should not be justified in pronouncing for a dissolution. But the petitioner is clearly entitled to a judicial separation. I shall not, however, give a final decision that the petitioner may determine whether she will take the opinion of another Court, or whether she will try the effect of such a notice as I suggested.

The case came on again on the 6th of August for further

(1) 1 Swab. & Trist., 185.

(2) L. R., 3 P. & M., 129.

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hearing to establish the desertion, and evidence was given by the petitioner, which, as far as material, was as follows:

I had laid by several things to use again for house-keeping. We certainly had not given up all idea of living together again. There were some articles of plated-ware and door screens, things of that sort expensive to buy again. My husband wrote for them to raise money. I gave over the plated things to my husband on his letter. I was not aware of his going at the time he went to Madras. I would certainly have joined him at Madras if he had asked me. The separation from my husband in house was entirely caused by pecuniary pressure on us both. In consequence of that pecuniary pressure it was a joint arrangement that I should live with my family, and he with his mother. I consented to the arrangement till my husband could get a berth, and again offer me a home. If he had asked me to go to him at Madras, I certainly would have done so without any pledge of better behaviour from him.

KENNEDY, J.—Possibly, if Mr. Jackson's very able argument had been addressed to me before I had occasion to consider the case and had formed a deliberate opinion, I might have given judgment in favor of his client, but when I gave my former judgment I had thoroughly convinced myself, at least by examination of all the decisions bearing on the subject, that there was not in this case what amounted to desertion; and I still retain this opinion. I had not intended to permit further argument, but the petitioner having applied for leave to put further evidence on the record, I postponed the case for that purpose, and I then did not wish to prevent Mr. Jackson calling my attention to his view of the authorities.

Naturally the Court before whom this question had come were anxious rashly to avoid laying down a general principle, and as much as possible relied on the special circumstances in each case as constituting desertion or preventing the separation from taking that character; but in *Fitzgerald* v. *Fitzgerald* (1) the Judge Ordinary does lay down, in unmistakeable terms, a principle, which I think I am bound to accept even if it did not

(1) L. R., 1 P. & D, 694.

commend itself to my mind as correct. He says, "no one can desert who does not actively and wilfully bring to an end an existing state of cohabitation." He explains, as I understand him, that mere absence does not necessarily cause a breach of cohabitation; that there may be cases in which, as in *Williams* v. *Williams* (1), there was personal severance, but what may be called constructive cohabitation; but I do not see that the present case is brought within them. *Townsend* v. *Townsend* (2) shows the withdrawal from the wife's society under pressure of circumstances is not abandonment against her will, and even if, in spite of the language in *Fitzgerald* v. *Fitzgerald* (3), any subsequent events may change the original separation into desertion, I do not find anything to bring this within them, as they are explained in *Fitzgerald* v. *Fitzgerald* (3), and to make me believe that the cohabitation was merely suspended.

On the contrary, in this case, this unfortunate lady had suffered long and much from her husband's misconduct. Conjugal cohabitation, in its full sense, had ceased for two years before there had been a severance of residence by mutual consent caused by the pressure of circumstances, and I cannot help believing that she must unconsciously overrate her wish to return to cohabitation, when one sees the earlier statements in her first examination, and her description of her attempts to reclaim him, which forcibly brought to my mind the case of Adriana in the Comedy of Errors. I cannot get over the express language of Lord Penzance in *Fitzgerald* v. *Fitzgerald* (3): "If the state of cohabitation has already ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion, in my judgment, becomes impossible to either, at least until their common life and home have been resumed."

If, however, this opinion of mine be erroneous, my error may be corrected by the Court of appeal, and I have therefore afforded this lady the fullest opportunity of bringing upon the record every fact deemed material by her advisers.

The petitioner appealed from the decree which gave her merely a decree for a judicial separation, on the ground that the

(1) 3 Swab. & Trist., 547. (2) L. R, 3 P. & M, 129.
(3) L R, 1 P. & D 694.

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evidence was sufficient to establish desertion without reasonable excuse for two years and upwards, and that therefore the decree should have been one for dissolution of the marriage.

Mr. *Jackson* and Mr. *Trevelyan* for the appellant.

The following cases were cited :—*Fitzgerald* v. *Fitzgerald* (1), *Haviland* v. *Haviland* (2), *Gatehouse* v. *Gatehouse* (3), *Meara* v. *Meara* (4), *Cudlip* v. *Cudlip* (5), *Lowe* v. *Lowe* (6), *Graves* v. *Graves* (7), *Williams* v. *Williams* (8), and *Gibson* v. *Gibson* (9).

The judgment of the Court (Garth, C. J., and Markby, J.) was delivered by

GARTH, C. J.—In this case the parties were married in September 1856, the petitioner being then about 15 years of age. They lived together, in Calcutta, for some years after the marriage, but had no children. In October 1864, the petitioner discovered that the respondent had committed adultery with her ayah. She did not on this account withdraw from cohabitation with the respondent, but from that time the respondent treated her with neglect. About this time she began to support herself by teaching in a school, and in 1869, in consequence of his constant absence until a late hour at night, she ceased to have sexual intercourse with him. They continued, however, to live together, and there is no reason to suppose that the husband was desirous of renewing the intercourse. On the contrary, she states, and this is not denied, that at this time her husband wholly neglected her. During this time also the respondent contributed nothing to the support of the petitioner, and frequently made demands for money upon her for his own purposes. They became involved, and in 1871, were obliged to give up the house in Circular Road, in which they then resided.

(1) L. R., 1 P. & D., 694.
(2) 32 L. J., P. & M., 65.
(3) L. R., 1 P. & D, 331.
(4) 35 L. J, P. & M., 33.
(5) 27 L. J., P. & M., 64.
(6) Unreported.
(7) 33 L. J., P. M. & Adm., 66.
(8) 3 Swab. & Trist., 547.
(9) 29 L. J., P. & M., 25.

The petitioner then proposed that they should take a smaller house, which they could have done; but the respondent refused to sign any lease, and it was then, under the pressure of pecuniary difficulties, that they arranged that he should go to his mother's house until they could find means to provide a home. Whilst he was at his mother's house, she visited him twice, but he treated her with the greatest indifference. When the house in Circular Road was given up, the wife had retained sundry articles of furniture with a view to the possibility of their living together again, but the husband had them sold, and the proceeds were spent by him. He afterwards left his mother's house, and refused to tell his wife where he was going. In 1872, without any communication with his wife, he left Calcutta for Madras, where he has since resided, and has been guilty of frequent acts of adultery. He has occasionally visited Calcutta, and she once saw him, but only in public. On this occasion she did not speak to him, nor he to her. From 1869 down to the present time, the petitioner has resided in Calcutta, and the respondent has contributed nothing to her support.

There being no doubt as to the adultery, the only question is as to the desertion. The learned Judge of the Court below thought that he was compelled, upon the authority of the case of *Fitzgerald* v. *Fitzgerald* (1), to hold that in this case there had been no desertion, because the separation in 1871 was assented to by the wife.

Now we do not for a moment dispute the proposition that either where the separation is the act of the wife, or where the wife of her own free will assents to a complete separation, there can be no desertion; nor until husband and wife have again cohabited, can subsequent conduct transform what was a voluntary separation into desertion by the husband. But we think this is not a case of that kind. In the case of *Fitzgerald* v. *Fitzgerald* (1), upon which the learned Judge relied, the separation took place by the act of the wife alone, not in obedience to any external necessity, but for the express purpose of avoiding continued intercourse; and intercourse was not merely suspended by her, but put an end to. It is upon these grounds that

(1) L. R., 1 P. & D., 694.

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Lord Penzance considered the desertion in that case to be the act of the wife. But here the case is wholly different. The wife, notwithstanding the gross misconduct of her husband, continued to live with him for seven years, during the latter years struggling, by her own earnings, to keep up a house for herself and him, whilst he did nothing. Even when at last she was compelled by their debts, and his refusal to enable her to take a smaller house, to separate from him, she did all she could to prevent an entire separation, and to make it practicable for them to live together again. But she was thwarted in these attempts by her husband; he sold the little furniture she had saved; he repelled her visits; and at last he refused to let her know where he was to be found. No doubt, after he left Calcutta for Madras, she made no further attempt to go to him or to induce him to return. But we think she had done, not only all that any woman could be reasonably expected to do, but from a legal point of view, enough to show that the separation was neither brought about by her, nor in accordance with her wishes. It may indeed be true that the respondent would have been perfectly willing to go on living with the petitioner, if she could have earned enough money for them both, whilst he remained in idleness; and as long as she could do this, she was also willing, in spite of his misconduct, to live with him, even upon these terms. But we think it is clear from his conduct, immediately after they gave up house in 1871, and subsequently, that when he found his wife could not support him, he was desirous to be rid of her altogether. After they had been compelled by difficulties of his own creating to live apart, he was bound to keep up with her such intercourse as the nature of the case admitted; but this, in our opinion, he distinctly refused to do.

When the case was being argued, we were disposed to think, that the petitioner having for two years withdrawn from conjugal intercourse with the respondent, she could not afterwards complain that her husband had deserted her; but it is clear that this withdrawal was brought about entirely by the husband's misconduct, and that it was a matter to which he on his part was wholly indifferent.

We cannot find any authority that a withdrawal under such circumstances disentitles a wife to charge her husband with desertion.

We think, therefore, that we ought to grant a decree *nisi* for a dissolution of the marriage, instead of a judicial separation, and that the petitioner should have her costs in both Courts on scale 2.

Appeal allowed.

Attorney for the appellant: Mr. *Fink.*

APPELLATE CRIMINAL.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunninghan.

THE EMPRESS *v.* KUDRUTOOLLAH AND OTHERS.*

1878
March 22.

Practice—Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X 1872), *ss.* 4, 220, 221.

Section 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require, that the conviction or acquittal should be by the Magistrate who drew the charge.

THE prisoners were charged with rioting under s. 147 of the Penal Code.

The facts of the case, and the reasons for the reference, sufficiently appear from the order of the Sessions Judge referring it to the High Court, and which ran as follows:

"At the sitting of the Court for the trial of this case an "illegality was apparent on the very face of the commitment. "It appears that the Joint Magistrate has gone through the case "and all but decided it, having drawn up a charge, examined "the witnesses for the defence, and recorded two judgments, or "a judgment with a postscript, the former dated 29th December "1877, and the latter dated 18th January 1878. On this last "date the Joint Magistrate records an order that the charge

* Criminal Reference, No. 17 of 1878, from the order of H. C. Sutherland, Esq., Sessions Judge of Zilla Backergunge, dated the 13th March 1878.

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"which he had himself drawn up was cancelled, and that the "prisoners were committed to the Sessions. This I hold that the "Joint Magistrate had no power to do. Having drawn up a "charge, the Joint Magistrate was bound to convict or acquit. "He had no third course open to him, *vide* explanation, s. 220, "Criminal Procedure Code. It cannot be contended that s. 221 "helps the Joint Magistrate, because it is clear that the two "sections must be read together. It cannot be said that s. 221 "justified a procedure which s. 220 distinctly precludes; and "there is all the more reason for this when it is borne in mind "that the explanation to s. 220 is altogether new in the Criminal "Procedure Code. Clearly then the legislature knew what "they were about, and they could hardly, with their eyes open, "have introduced the explanation to s. 220 providing that "if a charge is drawn up the prisoner must be either acquitted "or convicted, and go on in s. 221 to provide a third course for "Magistrates to follow. I hold then that, by the words "at any "stage of the trial," in s. 221, the legislature fully and deli-"berately intended that the explanation in the previous section "should be followed and read consistently, and read to mean "at any stage before the Magistrate had drawn up a charge.

"There is a further difficulty in the case. The Joint "Magistrate has only committed on the same charge on which "he had previously charged the prisoners as triable before him. "The necessity for the commitment is not, therefore, apparent.

"I have searched in vain for any reported case to throw "light on the present difficulty. I certainly never before heard "of a Magistrate cancelling a charge once made.

"The case must be referred to the High Court under s. 197, "explanation, Criminal Procedure Code, in order that the Joint "Magistrate's commitment may be quashed."

No one appeared upon the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—"Trial," according to the definition in s. 4 of the Criminal Procedure Code, means "the proceedings taken in Court after a charge has been drawn up." It is clear, therefore, that s. 221 of the Criminal Procedure Code, which

follows s. 220, authorizes a Magistrate, although a charge may have been drawn up, to stop further proceedings and commit for trial: for this purpose s. 221 may be regarded as a proviso to s. 220. It may be added that, though the explanation to s. 220 provides that if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew it.

We see no reason, therefore, to quash the commitment.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

THE EMPRESS *v.* BUTTO KRISTO DOSS AND ANOTHER.*

1878
March 4.

Public Servant—Penal Code, ss. 21 *and* 109.

A person appointed by the Government Solicitor, with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as Prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Indian Penal Code.

IN this case the accused were charged under s. 109 of the Penal Code with offering a bribe to Mr. Hume, who was alleged to be a public servant. It would appear that Mr. Hume was appointed by the Government Solicitor, with the approval of the Government, and under arrangements sanctioned by the Governor-General in Council, to act as Government Prosecutor in the Calcutta Police Courts.

The point referred by the Presidency Magistrate for the opinion of the High Court was, whether, under these circumstances, Mr. Hume was to be considered a public servant.

No one appeared on the hearing of the reference, and the judgment of the Court was delivered by

JACKSON, J.—We think it clear that the person appointed by the Government Solicitor, with the approval of the Government, to act as Government Prosecutor, under the arrangements made by the Governor-General in Council, is a public servant within the meaning of s. 21, Indian Penal Code.

* Criminal Reference, No. 51 of 1878, from an order passed by F. J. Marsden, Esq., Presidency Magistrate of Calcutta.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877
Nov. 28.

GOGON MANJY (DEFENDANT) *v.* KASHISHWARY DEBY AND OTHERS (PLAINTIFFS).*

Suit for Kabuliat—Enhanced Rate—Presumption of Landlord's willingness to grant Pottah.

In order to entitle a landlord to sue a tenant for a kabuliat at a certain rate of rent, he should either have tendered a pottah to the tenant at the rate of rent mentioned in the kabuliat, or he should be willing to grant a pottah at that rate; and if the Court considers that the rent which he claims is the correct amount, it will presume that he is ready to grant a pottah at that rate, and will give him a decree for the kabuliat.

But this presumption will not hold if the Court thinks that the rate claimed is too high; and in such a case, therefore, the presumption having failed, the landlord will not be entitled to a kabuliat at such lower rate as the Court may think just, but his suit will be dismissed.

Golam Mohomed v. *Asmut Ali Khan Chowdhry* (1) followed, and *Gopeenath Jannah* v. *Jeteo Mollah* (2) dissented from.

THIS was a suit for a kabuliat at an enhanced rent by the owners of a jote against a ryot in occupation of the jote, who paid their share of the rent to each of the plaintiffs. The Court of first instance found that the defendant was a ryot liable to enhancement of rent, and that he had been duly served with a proper notice of enhancement under Beng. Act VIII of 1869, s. 14; that enhancement was sought on the ground that the rent paid by the defendant was below the rate prevailing in adjacent places. It also found that the plaintiffs had not established that ground, and it appeared that the plaintiffs had not tendered a pottah to the defendant at the rate mentioned in the kabuliat, nor had they expressed themselves willing to grant a pottah at that rate and upon these facts dismissed the plaintiff's suit. The lower Appellate Court took evidence as to what was a proper rent to be paid, and granted

* Appeal under cl. 15 of Letters Patent, against the decree of Mr. Justice White, dated the 13th of July 1877, in Special Appeal No. 2158 of 1876.

(1) 10 W. R., F. B. 14. (2) 18 W. R., 272.

the plaintiff a kabuliat at that rate, which was lower than the rate claimed.

From this decree the defendant preferred a special appeal to the High Court on the ground that the plaintiffs having failed to prove that they were entitled to a kabuliat for the enhanced rent claimed by them, their suit should have been dismissed, and that the lower Appellate Court was wrong in giving a decree for a kabuliat for a rent which the plaintiffs had not before suit expressed their readiness to accept

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Sreenath Doss* for the respondents.

The special appeal came on or hearing before White, J., who confirmed the order of the lower Appellate Court, and the defendant thereupon preferred the present appeal under cl. 15 of the Letters Patent.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Grija Sunker Mozoomdar* for the respondents.

GARTH, C. J. (BIRCH, J., concurring.)—We think that this appeal should be allowed. The judgments of the Subordinate Judge, and that of Mr. Justice White, appear to us to be directly opposed to the ruling of the Full Bench in the case of *Golam Mohomed* v. *Asmut Ali Khan* (1).

The grounds upon which that case proceeded, as we understand them, are these: that in order to entitle a landlord to sue a tenant for a kabuliat at a certain rent, he should either have tendered to the tenant a pottah at the rate of rent mentioned in the kabuliat, or he should be willing to grant a pottah at that rate; and when he brings a suit against his tenant for a kabuliat at a certain rent, it must be presumed, that he is ready to grant a pottah at that rate. That presumption would enable him to succeed in his suit, if the Court considers that the rent which he claims is the correct amount. But if the

(1) 10 W. R., F. B., 14.

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Court thinks that he is not entitled to a kabuliat at the rate claimed, but at a lower rate, then it is plain, that no presumption can be made in favor of his having been willing to grant a pottah at that lower rate. On the contrary, the fact that he has attempted by legal proceedings to enforce the payment of the higher rent, raises a presumtion that he would not have been content, when he brought his suit, to accept a kabuliat at the lower rate.

He is, therefore, not entitled to a decree for a kabuliat at the smaller rate, because the Court cannot presume that he would have granted a pottah at that rate.

This is the ground upon which, as we understand it, the judgment of the Full Bench proceeds, and it has since certainly been acted upon in that sense in many other instances.

It appears to us, that the case of *Gopeenath Jannah* v. *Jeteo Mollah* (1), decided by Mr. Justice Kemp and Mr. Justice Glover, is not in accordance with the rule laid down by the Full Bench, and that we are, therefore, justified in dissenting from it.

It has been contended before us, that it is the same thing whether the landlord sues for enhanced rent *simpliciter*, or sues for a kabuliat at an enhanced rate. But that is not so. When a landlord, after notice, sues for enhanced rent, the Court may give him a lower rate of enhanced rent than that which he claims, because in such a suit it is not necessary that the landlord's willingness to grant a pottah at the rent demanded should be proved or presumed, and when in that suit the proper amount of rent has been ascertained and fixed between the parties, the landlord may safely demand from the tenant a kabuliat at that rate, and sue him for it.

This distinction between suits for enhanced rent and suits for a kabuliat at enhanced rent, appears to us to be clearly pointed out by the Chief Justice in the Full Bench case.

For these reasons we consider that the Subordinate Judge was wrong; and we consider that, in a suit of this nature, no distinction can be drawn between cases in which a kabuliat is demanded after notice and cases in which no such notice is

(1) 18 W R, 272.

given. The judgments of both the Appellate Courts will be reversed, and the judgment of the First Court restored, with costs in each Court.

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Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

HEERA LALL PRAMANICK AND OTHERS (PLAINTIFFS) *v.* BARIKUNNISSA BIBEE (DEFENDANT).*

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Evidence Act (I of 1872), *ss.* 101, 103, 106—*Onus of Proof.*

In the year 1862, the plaintiff brought a resumption suit against *A*, in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakheraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B*, who derived her title through *A*, to have the rent assessed. *B* pleaded by way of bar to the jurisdiction, that the lakheraj grant, under which *A* claimed, was made previously to 1790. *Held*, that the onus of proving this plea was upon *B*.

Baboo *Gooroodass Banerjee* for the appellants.

Mr. *H. E. Mendies* for the respondent.

THE facts material to the point decided in this appeal were sufficiently stated in the judgment of the Court, which was delivered by

GARTH, C. J.—So far as the merits of this case are concerned we are not called upon here to adjudicate upon them. The Munsif has determined the rate of rent which is payable by the defendant, and the District Judge, in his judgment of the 14th February 1877, says, that as regards the Munsif's decision on remand, in which the merits of the case were discussed and settled, the appellant did not raise any question before him.

The only point, therefore, which could be, or has in fact been, raised on special appeal in this Court is that of jurisdiction,

* Appeal under cl. 15 of the Letters Patent against the decree of Mr. Justice Ainslie, dated the 1st August 1877, in pecial Appeal No. 967 of 1877.

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which was determined in a former judgment of the Officiating Judge, dated the 13th of May 1876, in favor of the plaintiff. That judgment has been reversed by the learned Judge of this Court, and we have to consider the correctness of his judgment upon that point only.

The question arises in this way. The plaintiffs, in the year 1862, brought a resumption suit against the defendant's mother (under whom the defendant claims) in respect of the land in dispute, upon the ground that she was holding them by an invalid lakheraj title. The defendant in that suit contested the claim, but the plaintiff obtained a decree.

It does not appear from the proceedings in that suit, whether the lakheraj grant under which the defendant claimed, was before or after the year 1790 ; but it was distinctly stated in the decree, that the plaintiff (the decree-holder) was entitled to assess the property.

The plaintiff then, after a lapse of some years, brought this suit against the present defendant (who claimed under the defendant in the resumption suit), to have the rent assessed, and the defendant then set up (by way of plea to the jurisdiction of the Civil Court) that the lakheraj grant under which the defendant in the resumption suit claimed, was previous to 1790.

The Munsif, accordingly, framed the ninth issue in the case in these words: "whether the resumed lakheraj was of anterior date to the 1st of December 1790?"

The Munsif considered that the onus of proving the negative of this issue was upon the plaintiffs, apparently because he thought, that the plaintiffs ought to prove that the Civil Court had jurisdiction to try the suit, and as the plaintiffs did not prove the negative of the issue, the Munsif dismissed the suit.

On appeal, the Officiating Judge reversed the Munsif's decision, and remanded the case to be tried upon the merits. He considered that the case of *Ranee Shama Soonderee* v. *Situl Khan* (1) was an authority in the plaintiff's favor, and that the onus of proving the ninth issue lay upon the defendant.

On special appeal, the learned Judge of this Court thought the Officiating Judge was wrong, and he restored the Munsif's

(1) 8 B. L. R., app. 85, S. C., 15 W. R., 474.

first judgment, upon the ground, that as the jurisdiction of the Court to entertain the suit had been impugned, it was for the plaintiff to prove that the Court had jurisdiction.

After fully considering the point, we are unable to agree in the learned Judge's conclusion. The objection made to the jurisdiction of the Court was raised affirmatively by the defendant, by a statement, that the lakheraj grant was previous to 1790. The affirmative of the ninth issue, which was framed to meet that allegation, was asserted by the defendant, and by the 101st and 103rd sections of the Evidence Act, the burthen of proving any particular fact in issue lies upon the party who asserts that fact.

Moreover, in this case, the rule laid down in s. 106 of the Evidence Act is in favor of the plaintiffs' view, because if the defendant and her ancestors held and claimed to hold this property under a lakheraj grant, the terms and the date of that grant would certainly be rather within the knowledge of the defendant than of the plaintiff.

It is perfectly true, as observed by the learned Judge, that if the grant had in fact been made previously to 1790, the Collector's Court would have had jurisdiction to assess the revenue upon the property (1). But this fact raises no presumption in favor of the grant having been made prior to 1790. On the contrary, if any presumption were to be made as regards jurisdiction, it would be in favor of the ordinary and general tribunals of the country, to the exclusion of any special jurisdiction exercised under a particular Statute by the Collector, and if any presumption could be made in this case from the proceedings in the resumption suit, it would certainly be in favor of the plaintiff, because the decree in that suit contains a declaration "that the plaintiff is entitled to assess the lands."

We think, therefore, that having regard to the rules laid down by the Evidence Act, as well as to the general law and the circumstances of this particular case, the onus of proving the affirmative of the ninth issue was upon the defendant.

(1) See Reg. XIX of 1793, ss. 6 to 9.

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The judgment of the High Court will, therefore, be reversed, and the judgment of the District Court restored with costs in both Courts.

Appeal allowed.

Before Mr. Justice L. S. Jackson and Mr. Justice Cunningham.

1878 *Feby.* 26.

CHUNDER NATH CHOWDHRY (PLAINTIFF) *v.* TIRTHANUND THAKOOR AND ANOTHER (DEFENDANTS).*

Suit for Possession—Fraud—Limitation Act IX of 1871, *sched. ii, art.* 95—*Sale for Arrears of Government Revenue.*

Art. 95 of second Schedule to Act IX of 1871 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.

THIS was a suit for possession of certain lands. One Juggadanund, the paternal grandfather of the plaintiff, and Nobo Kishore, were uterine brothers, and were jointly entitled to the property in question. On the death of Nobo Kishore, his widow Annopoorna Chowdrain became entitled to a life-interest in her husband's share of the joint estate. On the 24th Bysakh 1269 B. S. (6th May 1862) Annopoorna Chowdrain granted to one Kharoo Lall Thakoor, the father of the first and second defendants, a patni lease of the property in dispute, in which she was jointly entitled with Gournath Chowdhry, the father of the plaintiff. A dispute took place, and the Collector made a settlement with Gournath and Annopoorna as widow of Nobo Kishore. Gournath Chowdhry thereupon brought a suit contesting the validity of the patni lease, and by a decree of the 7th August 1867, it was declared the patni lease should enure only during the lifetime of the widow. Subsequently, on execution of a money-decree obtained against Annopoorna Chowdrain, the right, title, and interest of the judgment-debtor in the lands in

* Special Appeal, No. 1052 of 1877, against the decree of J. D. Ward, Esq., Judge of Zilla Purneah, dated the 5th April 1877, affirming the decree of S. Wright, Esq., Subordinate Judge of that district, dated the 10th January 1877.

dispute were purchased by Koomar Ali, a mooktear. Again, in execution of another money-decree obtained against Gournath Chowdhry, the first defendant caused to be sold, and himself purchased, the reversionary right of the judgment-debtor to the property in which Annopoorna Chowdrain enjoyed a life-interest. Annopoorna Chowdrain survived Gournath Chowdhry, and on her death on 21st February 1869, Kharoo Lall, the father of the defendants, who had for some time previous been in sole possession of the property in dispute, made default, it was alleged through fraud, in the payment of Rs. 33 due as Government revenue. At the Government sale the lands were purchased by one Shib Persaud, the third defendant, and a cousin of the other defendants. The plaintiff's allegation being that such purchase was in reality made on behalf of the defendant himself. He, accordingly, brought this suit as heir and reversioner under the Hindu law after the death of Annopoorna, against Tirthanund Thakoor, his younger brother, and Shib Persaud. The first two filed a joint written statement, and the third defendant, a separate one. In both written statements it was contended that third defendant was an independent person distinct from the other defendants, and had purchased the property for himself. They further urged that as the sale had been for arrears of Government revenue it could not be impeached. It further appeared that, when default was made in payment of the Government revenue, the plaintiff had come forward to pay the same, but the Collector refused to receive it. The Court of first instance dismissed the suit on the ground that the claim was barred, inasmuch as the plaint under art. 95, sched. ii of Act IX of 1871 had not been filed within three years of the discovery of the alleged fraud. The lower Appellate Court dismissed the appeal, holding that the Government sale was a bar to all further suits.

The plaintiff now filed a special appeal to the High Court.

Baboo *Kalimohun Dass* (with him Baboo *Juggodanund Mookerjee*) for the appellant.

Baboo *Gopal Lall Mitter* (with him Baboos *Chundermadhub Ghose, Hemchunder Banerjee,* and *Tarahnath Sen*) for the respondents.

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CHUNDER NATH CHOWDHRY v. TIRTHANUND THAKOOR.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts of the case as above, and having observed that there could be no doubt that the purchase by Koomar Ali was made on behalf of the first defendant, and that Annopoorna having survived Gournath, the purchaser of the latter's reversionary right took nothing, proceeded as follows):—

Both the Courts below have dismissed the suit. The Judge in the third paragraph of his judgment says:—"It is quite "unnecessary to go at length into the questions of limita-"tion which the Subordinate Judge has discussed; it seems "to me that the revenue sale, as a bare fact by itself, utterly "bars the suit. In the first place, when it occurred it may "be doubted whether Kristanund was the person responsible "for the revenue, for he was merely Annopoorna's patnidar, "and at the instance of the father of the plaintiff, a competent "Court had declared that the patni title would only last for "Annopoorna's lifetime. According to plaintiff's own allegation, "she died on 21st February 1869, and the plaintiff himself "was therefore rightful reversioner in 1870, when the sale "took place, and the arrear fell due. But be this as it may, "there is no sort of privity as between joint holders for paying "their shares of the revenue of an estate; and whatever may "have been Kristanund's motives, I do not think his right to "default can be questioned. The plaintiff had every right and "chance of coming forward and looking after himself."

The Judge has omitted to notice that, in the first place, this property was unquestionably in the hands of Kharoo Lall, father of the defendant Tirthanund, at the time of Annopoorna's death. He also has forgotten that, on the occurring of the default, when the property was sold, the plaintiff came forward and asked to be allowed to put in the Government revenue and have the sale stayed, which, for what reason it is difficult to understand, the Collector disallowed. Now it seems clear that if the plaintiff succeeded in proving that the principal defendant's father had committed default in the payment of the Government revenue with the view of bringing the property to be purchased

in the name of Sib Persaud for his own benefit, that would be such a fraud as would entitle plaintiff to the assistance of the Court, and the property ought to be reconveyed to the plaintiff. But then it is said that if the plaintiff's suit was brought on that ground, he ought to have come in, under art. 95 of the second schedule to the now repealed Limitation Act, within three years from the date of the fraud being known to the party wronged. It seems to me that that article does not apply to a case like the present. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of those acts. In such a case he is bound to bring his suit within three years from the time when the fraud becomes known to him. In the present case, the fraud in question is merely a part of the machinery by which, if the plaintiff's case is true, the defendants have kept the plaintiff out of possession of a property to which he became entitled at the death of the widow Annopoorna. Becoming so entitled he was allowed by the usual Limitation Law twelve years from the date of his right accruing to begin his suit, and it certainly could not have been the intention of the legislature that, whereas in an ordinary case the plaintiff would be allowed twelve years to bring such a suit, his period would be cut down to three years, because, in addition to wrongful possession on the part of the defendants, there had been a gross and carefully concocted fraud. That article, consequently, does not apply to the present case. It seems to me, therefore, that the lower Courts ought to have enquired whether the facts have been as alleged by the plaintiff, —that is to say, whether Kharoo Lall, defendant Tirthanund's father, had allowed the arrears to fall due with the fraudulent intention of subsequent purchase, and whether Sib Persaud is really, as contended, no other than Tirthanund himself. A conclusion to which, I am bound to say, the facts of the case appear very strongly to point, and if that be so, the plaintiff, I think, was undoubtedly entitled to a verdict. The case, therefore, must go back to the lower Appellate Court in order that these questions may be tried.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Kennedy.

1877
Dec. 21.

SHAM NARAIN SINGH (DEFENDANT) *v* RUGHOOBURDYAL (PLAINTIFF).*

Mitakshara Law—Ancestral Property—Foreclosure—Alienation.

Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as security for the money lent.

Semble.—The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money

Query.—Whether ancestral property which was moveable when it descended, but has been converted into immoveable property, is not immoveable ancestral property for the purposes of the Mitakshara law.

SUIT to recover possession of certain lands acquired by one Brij Lall Sahu, the crandfather of the plaintiff, under a deed of conditional mortgage dated the 20th February 1847. Brij Lall Sahu afterwards foreclosed the mortgage, and on his death his son, Ram Buksh Sahu, the father of the plaintiff, instituted proceedings for and obtained possession of the lands and afterwards alienated them to the defendant. The plaintiff contended that such alienation was invalid as against himself, on the ground that the land was immoveable ancestral property, and therefore inalienable under Mitakshara law, and further that no legal necessity existed for the sale.

The defendant, in the third paragraph of his written statement, stated "that though the deed of conditional sale, dated 20th "February 1847, was executed in favour of Brij Lall Sahu, "father of Ram Buksh Sahu, yet the property in suit had not "become the right and interest of the plaintiff's grandfather "during his lifetime. Eventually Ram Buksh Sahu, father of "the plaintiff, instituted a suit, and with great labor, expense "and exertion, acquired the property in suit."

The Court of first instance dismissed the plaintiff's claim.

* Special Appeal, No. 708 of 1877, against the decree of E. Grey, Esq, Officiating Judge of Zilla Patna, dated the 15th of January 1877, reversing the decree of Baboo Matadin Roy Bahadur, Subordinate Judge of that District, dated the 29th of May 1876.

The lower Appellate Court held that the property in suit was ancestral property, and that, inasmuch as the defendant had failed to give proof of legal necessity for the alienation, the appeal must be allowed. The learned Judge was also of opinion that *Girdharee Lall* v. *Kantoo Lall* (1) did not apply.

The defendant now preferred a special appeal to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Rajendra Nath Bose* for the appellant.

Mr. *R. E. Twidale* and Moonshee *Mahomed Yoosuf* for the respondent.

The judgment of the Court was delivered by

KENNEDY, J.—In this case there is an appeal from the judgment of the Judge of Patna reversing the decision of the Subordinate Judge. As I understand, three points have been argued on behalf of the special appellant. The first question which he raises, is with respect to the nature of the property which is claimed by the plaintiff. The special appellant contends that, in truth, this is not ancestral immoveable property. We are, however, of opinion that it must be treated as being ancestral immoveable property.

The ancestor, Brij Lall, acquired this property by a deed of conditional sale. Now it has been held, and I have no hesitation in saying with perfect correctness, that up to the time of the foreclosure becoming absolute, the interest of the vendee by the conditional sale amounts only to securing his money. He has the land, he has it simply as security. One must remember, however, that from the beginning it was not so. Originally it was really a conditional sale, which became absolute on the expiry of the limited term. Legislation intervened, and by the Regulation, that which was by itself ripening into an absolute estate in land became converted into

(1) 14 B. L. R., 187; S. C., 22 W. R., 56.

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something which remained conditional until foreclosure proceedings were adopted; but if it were necessary for me to decide this point, I should strongly be inclined to think that the effect of the foreclosure would be to put an end to the original conditional sale and to make the property the immoveable property of the person who advanced the money from the commencement. However, I do not think it necessary here to decide that, for we find a most careful abstention by the defendants in their written statement from alleging that the proceedings which converted the interest in the property into an absolute interest were taken by Ram Buksh. Paragraph 3 of the defendant's written statement says—(*Reads.*) Evidently only referring to the proceedings for possession which invariably follow upon the foreclosure which converts a conditional into an absolute sale. And, therefore, I think that the property having been in the hands of Brij Lall, whether subject to the right of redemption or not, the defendant, appellant, would be bound to show that when it came into the hands of Ram Buksh it was not immoveable property; that he has certainly failed to do on the face of these proceedings. And I am now informed that on the face of the proceedings it appears that the foreclosure proceedings were in fact taken by Brij Lall. I do not at all see that even if moveable property came into the hands of a descendant and was converted into immoveable property, that that would not be an immoveable ancestral estate. I do not know of any authority which shows that the meaning of an immoveable ancestral estate is an ancestral estate which has descended in immoveable form. I am inclined to think that it includes an ancestral estate, no matter whether it descends in moveable or immoveable form.

The next point which has been raised is, that this money was applied for the purpose of carrying on a business which was for the benefit of the joint family. Now if that had been an ancestral business, I should have had little difficulty in holding, as it has been determined at least on the Original Side of this Court, that it is a part of the ancestral property which the descendant is bound to keep up, and to the

support of which he may apply all the ancestral assets (1). But it appears quite clear that this was not an ancestral business, but the separate business of Ram Buksh, which he transacted during the lifetime of his father. And therefore, though it may have been for the benefit of Ram Buksh, who was a member and kurta of the joint family, it is quite clear that it was not for the benefit of the joint family.

Again it has been suggested that as this was a case in which there had been a suit for recovery of property, that which is recovered becomes the separate property of the recovering member of the family. In the first place, the principal passage from the Mitakshara read by the pleader for the appellant only speaks of recovery had with the consent of the other members of the family. In the next place, it only refers to a partition amongst brothers. And I do not think it has derogated from the ancestral character of the property, although it may be enjoyed separately. In the third place, this is not such a recovery as is meant in the Mitakshara. The property was left in the hands of the mortgagor according to the ordinary meaning of the contract, and a suit after foreclosure proceedings is little more than a matter of form.

There was another point raised by the appellant, namely, that the Judge was wrong in making a distinction between the purchase in this case and the case of sale for discharge of debts. In our opinion, the Judge was perfectly right. The decision of the Privy Council referred to by him—*Girdharee Lall* v. *Kantoo Lall* (2)—clearly applies to cases of debts, and its reasoning applies to no other.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) See *Johurra Bibee* v. *Sreegopal Misser*, I. L. R, 1 Calc., 470, See also *Ramlal Thakursidas* v. *Lahmichand*, 1 Bomb H. C., App., 51, at p. 71; *Petumdoss* v. *Ramdhone Doss*, Tay., 279.

(2) 14 B. L. R., 187; S. C., 22 W. R., 56.

Before Mr. Justice Kemp and Mr. Justice Morris.

1878
Jany. 10.

SHIB NARAIN SHAHA AND ANOTHER (DECREE-HOLDERS) *v.* BIPIN BEHARY BISWAS AND ANOTHER (JUDGMENT-DEBTORS).*

Execution—Transfer of Decree—Jurisdiction—Striking case off the File—Act VIII of 1859, *ss.* 285, 286.

The jurisdiction of a Court to which a decree has been transferred for execution is strictly limited to carrying out such execution. Such Court has no power to issue a certificate under ss. 285, 286 of Act VIII of 1859 transferring the decree, already transferred to it, to another Court for execution. The Court to which a decree has been properly transferred for execution having struck the case off the file, a subsequent application for a further transfer of the case to another Court for execution should be made to the Court which originally passed the decree sought to be executed.

Bagram v. *Wise* (1) considered.

A DECREE was obtained in this case on the 31st of December 1862 in the Court of the Munsif of Rungpore. On the 22nd of February 1872 the decree was, under ss. 285, 286 of Act VIII of 1859, transferred to the Court of the Munsif of Julpigori for execution. On the 21st March 1874 the case was struck off the file of the Court of the Munsif of Julpigori. On the 26th March 1876 an application, accompanied with the usual certificate, was filed in the Court of the last mentioned Munsif, under s. 284 of Act VIII of 1859, for an order transferring the decree to the Court of the Munsif of Azimgunge for execution. The Julpigori Munsif refused the application, on the ground that, under cl. 167 of sched. ii of Act IX of 1871, the application ought to have been filed within three years from the date of the last application for execution, or from the date of the issue of notice under s. 216 of Act VIII of 1859. The application not having been made within that time was barred by limitation. On appeal the District Judge, relying upon *Brojendro Narain Roy* v. *Benode Ram Sen* (2),

* Miscellaneous Special Appeal, No. 92 of 1877, against the decree of R. F. Rampini, Esq., Judge of Zilla Julpigori, dated the 16th of January 1877, affirming the order of Baboo Khetter Prosad Mookerjee, Sudder Munsif of that district, dated the 8th of July 1876.

(1) 1 B. L. R., F. B., 91. (2) 11 W. R., 269.

held, that the case having once been struck off the file of the Munsif's Court, it had no jurisdiction to entertain the application, and that the application should have been made to the Munsif of Rungpore, and not to the Munsif of Julpigori. The judgment-creditor appealed to the High Court.

Baboo *Nogendro Nath Roy* for the appellants.—The Court of first instance had jurisdiction to entertain the application made; see *Bagram* v. *Wise* (1).

The respondent was unrepresented.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts of the case, continued):—The pleader for the special appellant refers to *Bagram* v. *Wise* (1), and contends that the finding of the Judge is wrong. In that case the late learned Chief Justice, Sir Barnes Peacock, who delivered the judgment of the Full Bench, remarked, that "as soon as a copy of the decree, which is sent for execution to "another Court, is filed in the Court to which it is transmitted, "it has the same effect as a decree of that Court," and "that Court," that is to say, the Court to which the decree is transmitted, "is to proceed to execute it according to its own rules in the "like cases."

No doubt the Munsif of Julpigori had authority and was competent to execute a decree of the Munsif of Rungpore that was transmitted to him, provided he had jurisdiction; but this is a case which, in our opinion, is not covered by the decision of the Full Bench quoted above. This was an application to the Munsif of Julpigori not to execute the original decree passed by the Munsif of Rungpore, but to take proceedings in execution upon his copy-decree and order, as provided in ss. 285 and 286 of the Civil Procedure Code, within the jurisdiction of another Munsif, *viz.*, that of Azimgunge. Clearly it was beyond the scope of the instructions conveyed to the Munsif of Julpigori, and outside his jurisdiction, to

(1) 1 B. L. R., F. B., 91.

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grant a certificate for this purpose. Moreover, as the execution case had been already struck off his file by him, the appellant before us ought, under s. 290, to have applied to the Sudder Munsif of Rungpore, who passed the original decree of the 31st December 1862, for the issue of a fresh certificate.

We, therefore, dismiss this appeal, but without costs, as no one appears for the respondent.

Appeal dismissed.

Before Mr. Justice White and Mr. Justice Mitter.

1878 *Feby* 18.

RAJCOOMAREE DASSEE (PLAINTIFF) *v.* GOPAL CHUNDER BOSE AND OTHERS (DEFENDANTS).*

Decree for Partition, Execution of—Partition of a Poojah Dalan—Consent of Co-parceners—Modification of Execution Order by Court.

A decree directed partition of a family dwelling-house (1) with its appurtenances, including a poojah dalan and courtyard adjoining it. In execution of that decree, the Civil Court Ameen, at the request and with the consent of two out of three co-parceners, did not partition the poojah dalan and courtyard. To this the third co-parcener objected, but her objection was overruled by the lower Courts, and it was directed that the property in question should remain undivided. *Held*, that the Court would be disinclined to order the property to be divided without giving the co-parcener or co-parceners who might wish to keep it entire an opportunity of doing so.

Held per WHITE, J., that, having regard to the form of the decree, it was not open to the Court executing it to order that any part of the property should remain joint, except with the consent of all the co-parceners who were parties to the suit.

Semble per MITTER, J., that the lower Courts were not precluded by the decree from dealing with the property in the mode in which they had done.

IN this case the respondent before the Court obtained a decree on 9th February 1875 against the appellant and one Ambica Churn Biswas for partition of a six-anna share of a

* Miscellaneous Special Appeal, No. 301 of 1877, against the order of H. B. Lawford, Esq., Officiating Judge of Zilla 24-Pergunnahs, dated the 29th June 1877, affirming the order of Baboo Kristo Mohun Mookerjee, Additional Subordinate Judge of that District, dated the 28th April 1877.

(1) Partition of a family dwelling-house may be claimed as of right by a Hindu—*Hullodhur Mookerjee* v. *Ramnauth Mookerjee* and others, Marsh., 35.

family dwelling-house together with its appurtenances, including a poojah dalan with a courtyard adjoining it. The appellant was a sonless Hindu widow claiming her late husband's six-anna share in this property, of which a four-anna share belonged to Ambica Churn Biswas and the remaining six-anna share to the respondent. Several objections were taken by the appellant in the Courts below to the partition made by the Civil Court Ameen. The only one material to the present report had reference to the poojah dalan and courtyard, which, at the request of the respondent, and with the consent of Ambica Churn Biswas, the Ameen had not partitioned. As to this objection the Subordinate Judge was of opinion that, under the principles of the butwarrah law, the poojah dalan and courtyard should be kept joint, as it was meet that the place of family worship should be always kept joint; and he did not consider the Court would be departing from the direction in the decree by ordering the place of family worship to remain undivided. He further expressed his opinion that if the objector, a Hindu widow, had a son living to perpetuate religious worship in her husband's house, such a frivolous objection would not have been raised, more especially as the other co-parceners were willing that the property in question should remain as it was.

On appeal the lower Appellate Court upheld the decision of the Subordinate Judge, being of opinion that it was quite impossible that a fair and equitable partition of this part of the property could be made.

The present appeal to the High Court was accordingly presented.

Baboo *Hemchunder Banerjee* for the appellant.

Baboo *Radhica Churn Mitter* for the respondent.

WHITE, J.—Several objections have been taken by the appellant to the partition which was made by the Ameen in this case, and upon which the orders of the two lower Courts have proceeded. To none of them do I think that this Court can yield in special appeal, except that which complains that certain

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RAJCOOMAREE DASSEE v. GOPAL CHUNDER BOSE.

property has not been divided as directed by the decree. The property which has been thus dealt with by the lower Courts consists of a poojah dalan, certain rooms on either side of it, a courtyard adjoining the dalan, and the western wall of the courtyard. This property has not been divided, but ordered by the Courts below to remain joint.

I think that, having regard to the form of the decree, it was not open to the Court in executing that decree to order that any part of the property should remain joint, unless it was with the consent of all the co-parceners who were parties to the suit. It appears that in this case two of the co-parceners did consent to this portion of the property remaining unpartitioned, but one of them, who is the appellant before us, objected to its remaining joint. This portion of the property is in its nature divisible, and no authority has been cited to show that it is undivisible by reason of the uses to which it is put. We must, therefore, set aside that part of the order of the lower Courts which declares that the property in question shall remain joint. Considering, however, the nature of the property and the fact that some of the co-parceners desire that it should continue undivided and be used as heretofore in its present condition, we are not prepared to direct that it should be divided amongst the three co-parceners in proportion to their shares, without giving the co-parcener or co-parceners who may wish to keep it entire an opportunity of doing so, if he or they can agree on the subject with the other co-parceners. The order, therefore, which we shall make in the present case is the following:—Let the poojah dalan, the rooms on either side of it, the courtyard attached thereto, and the western wall of that courtyard, being the property left undivided by the order of the lower Court appealed against, be valued, and if any one or two of the co-parceners wish to retain the same separately or jointly as part of his or their share, let the proportionate share of its value be paid to the remaining co-parcener or co-parceners who do not wish to retain the same. If none of the three co-parceners agree to take the same as part or parts of their share or shares, paying to the other or others of them a proportionate share of its value, or if the three co-parceners cannot agree

amongst themselves as to which of them shall be allowed to take the same as part of his or their share or shares, then let this property be divided between the three co-parceners in proportion to their respective shares in the same. This will give to the two co-parceners who wish to keep it undivided an opportunity of doing so by paying a six-anna share of the value to the appellant, Rajcoomaree.

Each party will bear his own costs in this Court.

MITTER, J.—I concur in this order. But I desire to add that I would put it, not upon the ground that the lower Courts are precluded by the decree from dealing with this property in the mode in which they have done, but upon the ground that the order which we have passed is more equitable.

Decree varied.

Before Mr. Justice Kemp and Mr. Justice Morris.

BHYRUB CHUNDER (JUDGMENT-DEBTOR) *v.* GOLAP COOMARY (DECREE-HOLDER).*

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Jany. 10.

Right of Appeal—Decree—Execution-Proceedings—Registration Act (XX of 1866), ss. 52, 53.

There is no appeal from a decree, nor from orders passed in execution of a decree, made under s. 53 of Act XX of 1866 (Registration Act).

Hurnath Chatterjee v. *Futtick Chunder Summaddar* (1), *Radha Kristo Dutt* v. *Gunga Narain Chatterjee* (2), *Huro Soonduree Debia* v. *Punchoo Ram Mundul* (3) followed:—

IN this suit the judgment-creditor applied for execution of a decree obtained under s. 53 of Act XX of 1866 (Registration Act) upon an agreement specially registered under s. 52 of that Act. The judgment-debtor raised the point

* Miscellaneous Special Appeal, No. 173 of 1877, against the order of Baboo Digamber Biswas, Subordinate Judge of Zilla East Burdwan, dated the 22nd of March 1877.

(1) 18 W. R., 512. (2) 23 W. R., 328.
(3) 24 W. R., 225.

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of limitation, which was overruled by the Court of first instance. The judgment-debtor appealed to the High Court.

Baboo *Rash Behari Ghose* (with him Baboo *Nullit Chunder Sen*) for the respondent, raised the objection that no appeal lay on the authority of the above cases.

Baboo *Hem Chunder Banerjee* for the appellant in reply.

The judgment of the Court was delivered by

KEMP, J., who was of opinion that the cases quoted conclusively showed that an appeal could not be maintained.

Appeal refused.

Before Mr. Justice Kemp and Mr. Justice Morris.

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UNNODA PERSAD ROY (DECREE-HOLDER) *v.* SHEIKH KOORPAN ALLY (JUDGMENT-DEBTOR).*

Limitation—Application for Execution of Decree—Limitation Act (IX of 1871), sched. ii, art. 167—Act VIII of 1859, s. 214.

On the presentation of the last of a series of applications made for the execution of a decree, the Court is competent to consider the question whether, on the date of making a prior application for execution, the decree sought to be enforced was barred by limitation, and that notwithstanding the fact that notice of such prior application had been served on the judgment-debtor under s. 216 of Act VIII of 1859.

The time prescribed by the Limitation Act (IX of 1871) within which applications for execution may be made, govern all such applications made during the time that Act was in force.

Bemul Doss v. *Ikbal Narain* (1) followed.

IN this case an application was made for the execution of a decree on the 18th of June 1869. Again, on the 5th of August 1872, after the Limitation Act (IX of 1871) was in force, a

* Miscellaneous Special Appeal, No. 188 of 1877, against the order of F. C. Fowle, Esq., Judge of Zilla Tipperah, dated the 18th of April 1877, reversing the decree of Baboo Mutty Loll Mookerjee, First Munsif of Brahmanbaria, dated the 10th of January 1876.

(1) 25 W. R., 249.

second application was made for the execution of the same decree; and on the 7th August 1872 the usual notice under s. 216 of Act VIII of 1859 was issued upon the judgment-debtor. No further steps seem to have been taken by the judgment-creditor towards the realization of his decree till the 19th of June 1875, when a further application was made for execution of the decree. The judgment-debtor contended that, at the time of making the application of the 5th August 1872, such application was barred under art. 167, sched. ii of the Limitation Act (IX of 1871) then in force. The present application, therefore, could not be entertained by the Court. The Court of first instance granted the application. The lower Appellate Court reversed the decision of the Court below, on the ground that the application for the execution of the decree made on the 5th August 1872 was barred, being made more than three years after the filing of the prior application of 18th June 1869. The Court held, on the authority of *Jibhai Mahipati* v. *Parbhu Bapu* (1), that the limitation prescribed by art. 167, sched. ii of Act IX of 1871 governed all applications made for execution of decrees during the time that Act was in force.

The judgment-creditor thereupon appealed to the High Court.

Baboo *Trailakhya Nath Mitter* for the appellant.—The present application is not barred by limitation, being made within three years of 7th of August 1872, being the date of the notice of execution served on the judgment-debtor. The lower Court could not look beyond the fact of the issue of that notice, or take into consideration the question whether the decree was barred prior to the issue of such notice; see *Rohini Nundun Mitter* v. *Bhugwan Chunder Roy* (2) and a Full Bench ruling, *Eshan Chunder Bose* v. *Prannath Nag* (3). As the first application for execution was made before Act IX of 1871 came into force, that Act is not applicable, and the subsequent applications

(1) I. L. R., 1 Bomb., 59. (2) 14 B. L. R., 144; S. C., 22 W. R., 154.
(3) *Ib.*, 143; S. C., 22 W. R., 512.

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are, therefore, governed by the Limitation Act in force when the first application was made.

Munshi *Serajul Islam* for the respondent.—Act IX of 1871 does apply; see *Bemul Doss* v. *Ikbal Narain* (1), *Rughoo Nath Dass, Cookman* v. *Ranee Shiromonee Pat Mohadebee* (2).

The judgment of the Court was delivered by

KEMP, J.—The decree-holder is the special appellant in this case. The question is, whether the application which was made on the 19th of June 1875, is within time or not. The Judge of Tipperah has held that it is not. The grounds of special appeal taken are: first, that the lower Appellate Court is wrong in holding that the last application for execution was barred by limitation; second, that the lower Appellate Court is wrong in holding that the proceedings in execution taken before the passing of Act IX of 1871 are to be governed by the said law. The contention of the pleader who appears for the decree-holder on the first ground raised in special appeal is, that a notice having been issued under the provisions of s. 216, on the 7th of August 1872, and the present application being dated the 19th June 1875, he is within time, and that the Judge was not competent to look behind the date of the notice, and to take cognizance of any proceeding which had been taken before the date of that notice.

Now the Judge finds that, on the 5th of August 1872, when the application was made by the decree-holder, upon which application the notice was issued under the provisions of s. 216 of the Code, the decree was no longer alive; that it was barred, inasmuch as the application made prior to the 5th of August 1872 is dated the 18th June 1869, or more than three years before the later application. The pleader contends, that the Judge, as we have already stated, is not competent to go behind the notice, and that he ought to have held that the starting point was the 7th of August 1872, irrespective of the fact that the decree had already become barred by not being

(1) 25 W. R., 249. (2) 24 W. R, 20.

enforced between the 18th of June 1869 and the 5th of August 1872. In support of this contention he quotes two rulings, *Rohini Nundun Mitter* v. *Bhugwan Chunder Roy* (1) and a Full Bench ruling, *Eshan Chunder Bose* v. *Prannath Nag* (2). The first ruling by Mr. Justice Markby, sitting with Justice Romesh Chunder Mitter, decided that, under the new law of Limitation, Act IX of 1871, sched. iii, art. 167, prescribing three years as the time within which application should be made for execution of decrees, it was intended that there should be two specific dates from which the three years were to be counted, without reference to any inquiry whether the proceedings were taken for the purpose of enforcing the decree or were merely colourable for the purpose of keeping the decree alive. Now the Judge in this case could not have gone into the question whether the application and notice under s. 216 was a *bonâ fide* application or a colourable application; but the Judge was competent to decide whether, at the time that application was made, any decree was alive or not. He has done so, and found that, at the time that application was made, the decree was not alive. With reference to the Full Bench decision referred to by the pleader at page 512 of the same volume, the late Chief Justice Sir Richard Couch, who delivered the judgment of the Full Bench, observes, that Act IX of 1871 clearly gives to a person who has a decree, the power, so far as regards the law of limitation, of applying for execution of it within three years from its date, or within three years from the date of the application to the Court to enforce it or keep it in force, and that there is no restriction as to the second or third or any subsequent application. Now this ruling assumes that the party who applies has a decree which is alive, and that he can make an application to enforce that decree either within three years from its date or from the date of any application made to enforce or keep in force that decree, or from the date of any notice which he may have issued under the provisions of s. 216. We think that the view of the Judge is a correct view with reference to this ground of special appeal, which we therefore overrule. The second ground taken

(1) 14 B. L. R., 144; S. C., 22 W. R., 154.

(2) 14 B. L. R., 143; S. C., 22 W. R., 512.

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by the pleader for the appellant is fully disposed of by the case of *Bemul Doss* v. *Ikbal Narain* (1). The principle of this decision is the same as that which has been affirmed by the Full Bench decision in *Bissessur Mullick* v. *Dhiraj Mahatab Chund Bahadoor* (2), which has not been in any way interfered with by subsequent rulings of the Full Bench.

The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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March 2, 6, 8; *June* 9.

HARDEO BUX (ONE OF THE PLAINTIFFS) v. JAWAHIR SINGH (DEFENDANT).

[On appeal from the Court of the Commissioner of Seetapore in Oudh.]

Oudh Estates Act (I of 1869), *s.* 3—*Registered Talukdar—Beneficial Interests—Act II of* 1863, *s.* 1 *and Act XXXII of* 1871, *s.* 4 —*Appeals.*

An Oudh taluk standing in the name of J. S., as kabuliatdar, having been confiscated under Lord Canning's proclamation of March 1858, was summarily settled with J. S. on the 24th April following. A talukdary sanad was granted to J. S., and he was subsequently registered as talukdar under the provisions of Act I of 1869.

In a suit against J. S. by persons alleging themselves to be joint in family and estate with him, to have their interest in the taluk declared, held by the Commissioner of Seetapore in Oudh, confirming the decision of the Settlement Officer, that, under Act I of 1869, the defendant was protected by his sanad against any claim of the plaintiffs in respect of the taluk. *Held* by the Privy Council on appeal, that as a person who has been registered as a talukdar under Act I of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have, made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly; the suit must be remanded for trial as to whether the defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and sanad, or the rents and profits thereof, in trust for the plaintiffs.

* *Present:* Sir J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 25 W. R., 249. (2) B. L. R. Sup. Vol., 967.

The cases of *Mussamut Thukrain Sookraj Koowar* v. *The Government of India* (1) and *The Widow of Shunkur Sahai* v. *Rajah Kashi Pershad* (2) approved.

The words "Court of highest civil jurisdiction in any Province" in Act II of 1863, have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. A Court which, under the provisions of Act XXXII of 1871, is a subordinate Court, has no authority, under Act II of 1863, to admit an appeal to Her Majesty in Council even where its decision is final.

THE suit in which this appeal was preferred was instituted in the Court of the Settlement Officer of Seetapore in Oudh on the 28th August 1865, by the appellant and one Purbut Singh, who did not join in the appeal, as plaintiffs, against the respondent, as defendant, to establish their right and title under the Hindu law to the possession and enjoyment of a two-thirds undivided share of and in Taluk Bassaindeeh situated in the Seetapore district. The plaintiffs alleged that they, along with the defendant, were members of a joint undivided Hindu family, and that the taluk in question was joint ancestral property. The defendant contended that, with a small exception, the taluk was his own separate property in which the plaintiffs were not entitled to share, and of which he had always held sole possession; and that as the lands had been settled with him, and a talukdary sanad had been granted to him in his sole name by the British Government, the claim of the plaintiffs could not be entertained.

On the 21st December 1871, the suit was dismissed by the Settlement Officer upon the sole ground that the defendant was protected by his sanad under the provisions of Act I of 1869. On the 10th June 1872 the decision of the Settlement Officer was confirmed by the Commissioner of Seetapore as "in accordance with the invariable practice of the Courts since re-occupation." Subsequently, however, on the plaintiffs' application, the Commissioner certified the case to be a fit one for appeal to Her Majesty in Council, on the ground that, since his decision had been pronounced, cases had been decided by the Privy Council, the effect of which had been to modify the view of the

(1) 14 Moore's I. A., 112. (2) L. R., 4 I A., 198.

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law relating to taluks in Oudh formerly taken by the Oudh Courts.

The facts of the case and the nature of the proceedings taken in the Courts below will appear from their Lordships' judgment.

On the appeal coming on for hearing, Mr. *Doyne* for the respondent took the preliminary objection that the Commissioner of Seetapore had no legal authority to admit it. Under Act II of 1863, s. 1, an appeal to the Privy Council must be from an order of the Court of highest civil jurisdiction. But under s. 4 of Act XXXII of 1871, the Court of the Commissioner of Seetapore was subordinate in grade to that of the Judicial Commissioner. It did not matter that, in this instance, the decision of the Commissioner confirming that of the Settlement Officer was final. The Privy Council Appeals Act of 1874, which alters the words of Act II of 1863, and provides for an appeal from "the Court of final appellate jurisdiction," did not come into force until after the admission of the present appeal.

Mr. *Leith*, Q. C., for the appellant, contended, that it must be taken to have been intended by the legislature, in framing Act II of 1863, that the Court making the final decree in a suit should be deemed the Court of highest jurisdiction within the meaning of the Act. Here the judgment of the Commissioner, affirming the judgment of the Settlement Officer, was final under s. 18 of Act XXXII of 1871. If the objection is to prevail, the appellant is put in the position of having now to apply to Her Majesty for special leave to appeal.

Sir BARNES PEACOCK on behalf of their Lordships said, that the question raised was so doubtful that they would recommend the appellant to present a petition for special leave to appeal, which their Lordships would grant: and in the meantime as the parties were ready with their arguments, their Lordships would hear them *nunc pro tunc.*

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon*, for the appellant, submitted that, having regard to the evidence that the parties were members of a joint family, and the admission of the res-

pondent that the appellant was his co-sharer, the onus was on the respondent to show that the property in question was his sole and separate property. The fact that, for the convenience of the joint family the estate had stood in the name of the defendant as kabuliatdar had led to the summary settlement being made with him, and the sanad being granted in his sole name. But it was, nevertheless, to be taken that he held only in a representative capacity and in trust for the benefit of all the other members of the joint family. In favour of their contention they cited the judgment of Lord Justice James in the case of *Mussamut Thukrain Sookraj Koowar* v. *The Government of India* (1) and the cases of *Hurpurshad* v. *Sheo Dyal* (2) and *The Widow of Shunkur Sahai* v. *Rajah Kashi Pershad* (3). They further contended that if the appellant could not claim to be declared a joint sharer in the taluk, he should at any rate be declared to be a subordinate holder.

Mr. *Doyne* for the respondent.—The Courts below were right in dismissing the suit. Under Act I of 1869 the full proprietary rights in the taluk are vested in the respondent. He is the registered talukdar, and has an absolute title. The cases cited in which their Lordships had given effect to equitable rights as against talukdars were not analogous. In *Thukrain Sookraj Koowar* (1) the interests involved were not joint but separate, and there was an express written engagement entered into by the defendant to respect the plaintiff's rights if she consented to his being registered as sole talukdar. That case, moreover, was not as to the effect of a sanad in connection with Act I of 1869, but of a mere summary settlement in connection with the Government letter of the 10th October 1859, declaring the position of talukdars with whom lands had been settled. [Sir M. SMITH.—Is not the effect of the Government letter the same as that of the Act? Sir J. COLVILE.—The case is at any rate authority for the proposition that, in spite of a summary settlement of the taluk, we may go behind what appears and find a trust. There can be no trust of the talukdary rights, but there

(1) 14 Moore's I. A., 112, at pp. 126, 127. (2) L. R., 3 I. A., 259.
(3) L. R., 4 I. A., 198.

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may be beneficial interests in the lands comprised within the taluk subject to a trust.] In the case of *Hurpurshad* v. *Sheo Dyal* (1), also, there was no question as to the effect of Act I of 1869. The question was, whether the person who had acquired talukdary rights had transferred them. In the case of *The Widow of Shunkur Sahai* v. *Raja Kashi Pershad* (2), the defendant, in an application for a summary settlement, had solemnly and distinctly acknowledged the plaintiff's interest in a specific portion of the taluk, and had followed that acknowledgment by other admissions. The case was also distinguishable as a case not of confiscation, as in the present instance, but of exemption from confiscation under Lord Canning's proclamation of the 15th March 1858. In a case of exemption the presumption was, that it was made in favour of all the members, and not merely of a single member of a joint family. But where confiscation takes place all the previous rights of the joint family in the confiscated estate are lost, and the new grant must be construed strictly as made in favour of that person only who is named in it.

Mr. *Leith* in reply.

Their Lordships' judgment (which was postponed until, under the special leave granted, a petition of appeal had been duly lodged and referred to the Judicial Committee) was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the Commissioner of Seetapore, in Oudh, dated the 10th June 1872, affirming a decree of the Settlement Officer of that district, dated the 21st of December 1871.

When the appeal was called on for hearing, Mr. Doyne, the learned counsel for the respondent, took a preliminary objection and contended that the Commissioner had no legal authority to admit the appeal. In support of his contention, he referred to the Oudh Civil Courts Act (No. XXXII of 1871), and to Act No. II of 1863. By the 4th section of the former Act, five grades of Civil Courts in the Province of Oudh were established,

(1) L. R., 3 I. A., 259. (2) L R., 4 I. A., 198.

of which that of the Judicial Commissioner was the highest. By s. 15, cl. 3, of the same Act, an appeal from a decree of the Commissioner, when an appeal is allowed by law, lies to the Judicial Commissioner; but by s. 18 it was enacted that if the Court of first appeal confirms the decision of the Court of first instance, such decision shall be final.

By s. 1 of Act II of 1863, which was a general Act to regulate the admission of appeals to Her Majesty in Council from the Courts in the Non-regulation Provinces in India, the right of appeal was limited to final judgments, decrees, or orders made on appeal or revision by the Court of highest civil jurisdiction.

It was contended on the part of the appellant that, as the judgment of the Commissioner affirming the judgment of the Settlement Officer was final, and no appeal lay from it to any Civil Court of higher jurisdiction, the Court of the Commissioner was, as regards this case, the Court of highest civil jurisdiction in the Province. It should be remarked that, in the Privy Council Appeals Act of 1874, which was passed after the appeal in the present case was allowed, and which repealed Act No. II of 1863, the words "Court of final appellate jurisdiction" are used in place of the words "Court of highest civil jurisdiction."

Their Lordships are of opinion that the Court of the Commissioner was not in this case the Court of highest civil jurisdiction in the Province within the meaning of Act II of 1863, notwithstanding that the decision of the Commissioner was final. If the Commissioner had reversed the decree of the Settlement Officer, his decision would not have been final, but an appeal might have been preferred to a higher Court of civil jurisdiction in the Province—*viz.*, to that of the Judicial Commissioner.

In their Lordships' opinion, the words "Court of highest civil jurisdiction in any Province," in Act II of 1863, had reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. If the Court of the Commissioner was the Court of highest civil jurisdiction in the Province, within the meaning of that section, because an appeal from his decision in the particular case did not lie to

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a higher Court in the Province, a Court of Small Causes would be equally a Court of highest civil jurisdiction in a case in which its decision is final; and, in that case, it might, under the provisions of the same section, admit an appeal to Her Majesty in Council, if it should declare the case a fit one for such appeal.

When the preliminary objection was made their Lordships recommended the appellant to present a petition for special leave to appeal, which was accordingly done, and special leave was granted. In order to avoid delay and expense, the Court suggested that the case should be argued *nunc pro tunc*, and that course was assented to by the learned counsel on both sides and adopted.

Under the special leave a petition of appeal has now been duly lodged, and referred to the Judicial Committee.

The suit was brought by Hardeo Bux, the appellant, and Purbut Singh against the present respondent. Purbut Singh has not joined in this appeal.

The plaintiffs in their plaint stated that, during the King's time, the Talukas of Bassaindeeh and Sijaolia formed one taluka, and that the fathers of the parties were seven brothers descended from a common ancestor; that four of them separated and partitioned Taluka Sijaolia from Bassaindeeh; that Taluka Bassaindeeh formed the share of Havanchal Singh, father of Hardeo Bux, plaintiff, Fateh Singh, father of Purbut Singh, plaintiff; and Bhawani Singh, father of Jawahir Singh, the defendant; that the plaintiffs' fathers, being seniors, used to make collections from the estate and to manage household expenses, including those incurred in marriage and funeral ceremonies; that the father of the defendant treated them as his superiors, and never interfered in the affairs of the estate; that defendant's father was junior, and was treated by the plaintiffs' fathers as if he were their own son; that they (the plaintiffs' fathers) got the kabuliat executed in his name with the view to avoid inconvenience to themselves, and to connect him with offices, but they all lived in commensality, and defrayed their expenses out of the income of the said taluka; that after the death of the fathers of the parties the old practice prevailed between them up to date; that they had been living

together and their expenses paid out of the profits of the same estate; that the plaintiffs had continued to enjoy the possession of the taluka while the defendant had been the kabuliatdar; that as the defendant was kabuliatdar the sanad had been granted to him; that for one or two months, the defendant had, under the sanad, given rise to enmity, and intended to dispossess them and put a stop to the profits enjoyed by them for the time past, and wished to deprive the real owners of their right, while the said sanad did not contemplate to destroy the rights of the plaintiffs; that in the arbitration case of *Bishashar Bux and Ganga Bux*, talukdars of Sorara, the defendant had, in his own deposition, stated that in case of his (defendant's) brothers claiming their shares he would not decline to give them their shares; that the defendant had altogether forgotten this written admission. Wherefore the plaintiffs prayed that, after proper inquiry orders be passed that they be not deprived of their right.

In their written statement dated the 6th October 1865, they stated that they had been compelled, by an order of the Criminal Court, dated the 15th September 1865, to give up possession, but that previously to that time they had held continuous possession. They prayed that, under the conditions laid down in the sanad, in cl. 2, Circular 2 of 1861, the Government of India letter No. 23, dated the 19th of October 1859, and Circular No. 6 of 19th June 1861, justice be done to them, and that they might not be deprived of their right.

The defendant, in his written statement, alleged that the taluka in dispute was the solely acquired property of his ancestors, and particularly of his father; that there had all along been only one kabuliat; that he had held possession without any one as co-sharer; and that he, of his own free-will, had been assisting his near relations with food, &c., without their having any right; and that a summary settlement had been made with, and a Government sanad granted to, him alone.

The Settlement Officer did not enter into the question whether the property was the self-acquired property of the defendant's father or was the joint ancestral property of the three brothers mentioned in the plaint, but he dismissed the suit upon the sole ground that the defendant was protected by Act No. I of 1869.

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He stated that he considered himself bound by the opinion of the Financial Commissioner in the late Supreme Court of Landed Estates Jurisdiction, in which, upon a petition presented by the plaintiff relating to another matter, the Financial Commissioner stated, "that the defendant was protected by his sanad, that the plaintiffs could get nothing, and that it was perfectly useless their continuing litigation."

The plaintiff Hardeo Bux appealed from that decision to the Commissioner, who, without giving any reasons, dismissed the appeal, stating that the suit had been dismissed in accordance with the invariable practice of the Courts since re-occupation. Subsequently, upon an application by the plaintiff to the same Commissioner for a certificate that the case was a fit one for appeal to the Privy Council, the Commissioner made the following remarks:—

"I have had this case before me several times since the receipt of the files, and I have consulted the Judicial Commissioner on the points as to which I have felt doubts.

"The case is before me on an application from the appellant for a certificate that it is a fit suit for appeal to the Privy Council. I have no hesitation in granting this certificate, for, though the order of this Court passed in appeal, and which it is now proposed to contest, is one so obviously in conformity with the previous practice of the highest Courts of Appeal in this province, that it hardly admitted of dispute, and did not require to be supported by any lengthy argument at the time it was written, since that time several cases have been before their Lordships, the orders passed in which have considerably modified the view of the law applying to talukas in Oudh previously taken by the Courts of the Financial and Judicial Commissioners; and though I do not find any case so clearly in point as to require me to hear an application for review, a course which has been suggested by the appellant, the case is clearly one in which he should be allowed every facility for bringing it before a higher tribunal.

"The certificate will, therefore, be granted, and this order will be filed with the record."

The suit was commenced long before Act I of 1869 was passed, *viz.*, as far back as the 28th of August 1865, but the judgment of the Settlement Officer, the Court of first instance, was not pronounced for upwards of six years afterwards. Some

of the proceedings which were taken in the meantime are detailed in the judgment of the Settlement Officer, and well might he describe them as "most extraordinary!"

The lands to which the suit relates were included in that part of Lord Canning's Proclamation of March 1858 which declared that the proprietary right in the soil was confiscated to the British Government which would dispose of that right in such manner as to it might seem fitting.

By the Government letter of the 10th October 1859, set out in the first schedule to Act I of 1869, it was declared that every talukdar, with whom a summary settlement had been made since the re-occupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right in the taluka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka.

By s. 3 the Governor-General in Council desired that the Chief Commissioner of Oudh should have ready a list of the talukdars upon whom a permanent proprietary right had then been conferred.

Previously to that letter, *viz.*, on the 24th April 1858, a summary settlement of the lands had been made with the defendant. He was consequently included in the list of talukdars, and a sanad was granted to him. After the passing of Act I of 1869, he was also registered in List No. 1 under Act I of 1869, s. 8, and also in List No. 5 (Oudh Government Gazette, August 7th, 1869).

The order for the summary settlement with the defendant was made by Colonel Barrow, the then Special Commissioner. The defendant, in his application for the summary settlement, stated that he had no partner other than the plaintiff Hardeo Bux.

(Their Lordships then referred to and read certain correspondence which passed between Mr. Wood, the Settlement Officer, and Colonel Barrow, the Commissioner of the Lucknow Division, as to the parties with whom the settlement had been made, and a memo. of the information conveyed by those letters, which had been sent by the Settlement Officer to the Commis-

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sioner of the Seetapore Division, and the orders of the Financial Commissioner thereon, and continued.)

In consequence of these orders the proceedings appear to have been suspended until the 13th December 1871, when the plaintiffs presented a petition praying for final orders. In the meantime Act I of 1869 had been passed. The then Settlement Officer took up the case, and, on the 21st December 1871, held, as before stated, that the plaintiffs' claim was barred by that Act.

Their Lordships cannot help remarking upon the irregularity of many of the above proceedings. They cannot attach any weight to Colonel Barrow's recollection to which he refers in his letter of the 6th April 1866. If any information from Colonel Barrow was considered necessary, he ought to have been examined as a witness. The Settlement Officer, who was acting as a judge, ought not to have written to him to know what his recollection was upon the subject of the summary settlement. His answer was not evidence, and cannot, any more than the opinion expressed in his letter on the 25th September 1866, be properly used in forming a judicial opinion on the case. Indeed, Colonel Barrow does not appear to have always entertained the opinion that the settlement was made with Jawahir Singh for his benefit alone, for in his minute, dated 11th April 1868, he says:—

"I have been much troubled by this case in many ways, and Jawahir Singh, by his bad faith with his relation, *who had lived with him as on undivided family in the Nawabee,* is only leading to his own discomfiture. I would have him look to the summary settlement which was made with him and Hardeo Bux. *Perchance that may yet be carried out.*"

Officers who act as judges, if entrusted at the same time with administrative duties, ought to be most scrupulous in the endeavour to form their opinions independently. They ought not to refer to their superiors, whether judicial or administrative, for opinions to enable them to form their own judgments, or for instructions or orders directing them as to the course which they, as judges, ought to pursue. As properly remarked by the Chief Commissioner in his Circular No. 6, p. 39,

"the Courts are open to all and must be guided by their own rules."

Colonel Barrow had no authority to stay, until the issue of new rules, the proceedings then pending judicially before the Settlement Officer. It does not appear whether new rules were ever issued. The Settlement Officer, in his judgment, treats the measures referred to by the Financial Commissioner as having acquired the force of law by Act I of 1869.

If the Settlement Officer had acted at once upon his own judgment, instead of referring for instructions or orders, the probability is that his judgment would have been given before Act I of 1869 was passed, and in that case he might have come to a different conclusion.

Be that as it may, their Lordships must deal with the case as they now find it.

The question is: Is the plaintiff entitled to any and what share or beneficial interest in the estate, or is his claim barred by Act No. I of 1869?

In support of the appeal the case of *Thukrain Sookraj Koowar* v. *The Government of India* (1) was referred to. In that case the plaintiff's husband, the younger branch of the great Oudh family of Bhinga, had, up to the time of the annexation of Oudh, been in the undisturbed and absolute possession of an estate called Deotaha, which had been united in the time of the Native Government with the large Taluk of Bhinga, of which the Rajah of Bhinga, the representative of the elder branch of the family, was the talukdar, the plaintiff's husband paying to the talukdar his proportion of the jamma assessed upon the whole taluka.

Upon the making of the summary settlement in 1858-59, after the suppression of the mutiny, the plaintiff was about to apply to the British Government for a summary settlement of the mehal which belonged to her husband, and which had descended to her. She was, however, dissuaded by the Rajah of Bhinga from so doing, he fully acknowledging in writing her right, and suggesting that, as she was old, she had better leave

(1) 14 Moore's I. A., 112.

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the protection of her interest to him, and pledged himself that her possession of the mehal should be respected and safe. The summary settlement was accordingly made with him alone. Subsequently one-half of the Rajah's estates was confiscated to Government in consequence of the discovery of some concealed guns, whereupon he pointed out for confiscation the entire mehal of the appellant as part of the one-half of his estates, and the plaintiff's estate called Deotaha was taken by Government, and the greater part of it made over to Oudh loyalists as a reward for good services.

It was contended that the summary settlement and the Government letter of the 10th October 1859 constituted the talukdar the absolute owner of the whole estate, including the appellant's estate, Deotaha, and consequently that it passed to Government under the confiscation against him. It was, however, held by the Judicial Committee that the settlement and letter had no such effect.

In delivering judgment Lord Justice James, speaking of the Government letter of the 10th October 1859, said (1): "In English language it gave the registered talukdar the absolutely legal title as against the State and against adverse claimants to the talukdary; but it did not relieve the talukdar from any equitable rights to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. In this case the appellant was the acknowledged *cestui que* trust of the registered talukdar, who bound himself expressly in writing that he would respect her rights if she would permit him to be alone so registered. It would be a scandal to any legislation if it arbitrarily, and without any assignable reason, swept away such rights, and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the laws or regulations or Government Acts in force in Oudh; and that the cruel wrong, of which this lady has been the victim, is due to the misapprehension of the law by the Commissioner. It is almost superfluous to add that the lady being clearly, as she was, the equit-

(1) 14 Moore's I. A., 127.

able owner, the decree of confiscation against her trustee could, on no principle of law, equity, or good conscience, be made to affect her, and certainly not to justify a sentence which, in effect, made her the sufferer for his offence."

An under-proprietary right, being the interest to which the appellant was entitled at the time of the annexation of Oudh, was, therefore, awarded to her, notwithstanding the summary settlement and the Government letter.

In that case there was a written agreement by the talukdar, prior to the summary settlement, to respect the rights of the widow if she would allow him to obtain the summary settlement. In the present case, however, there was no written agreement by the talukdar prior to his obtaining the summary settlement, but merely a representation by him that he had no partner except the plaintiff.

In the case of *The Widow of Shunkur Sahai* v. *Rajah Kashi Pershad* (1), decided in the Privy Council, 29th July 1873, there was also no written agreement signed by the talukdar, but merely a representation made by him at the time of his applying for a summary settlement, followed, apparently, by other admissions. In that case the widow of Shunkur Sahai was entitled as co-partner with Rajah Kashi Pershad to one-third share in seven villages. The summary settlement of 1858 was made with the Rajah as talukdar of twenty-six villages, including the seven in which the plaintiff was interested. In his application for the settlement, he stated that, in 1264 Fuslee, the summary settlement was made as to the seven villages in partnership with both him and the widow at one-third as the share of the widow and two-thirds for himself. In the settlement proceedings it was ordered that the settlement of the seven villages with others should be made with the Rajah as talukdar, and that the widow should be recorded as a co-partner. The settlement was accordingly made with the Rajah alone, and he alone engaged for the revenue. The sanad of the talukdary, including the seven villages, was, under the Government letter of 10th October 1859, granted to the Rajah alone. The Rajah disputed the widow's claim, and she sued

(1) L. R., 4 I. A., 198

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for proprietary, and also for under-proprietary rights. It was held by the Court of first instance that her suit for the former was barred, by the sanad being in the name of Rajah Kashi Pershad only; and that she could not recover under-proprietary rights because any title she might have had must have been to proprietary rights. It was held by the Financial Commissioner that the widow was entitled to one-third of the profits of the seven villages when the annual accounts should be made up. Upon appeal to Her Majesty in Council it was held by the Judicial Committee that there was no ground for holding that the summary settlement and the subsequent order of 1859 conferred talukdary rights on the widow, but that she was entitled to one-third share of the profits of the seven villages.

That case so closely resembles the present in many particulars, and the remarks of the Judicial Committee are so applicable to it, that their Lordships will read an extract from the judgment, which does not appear to have been yet reported. They say (1):

"The construction which their Lordships would put upon the words 'and that the name of Shunkur Sahai's widow be recorded as a shareholder' is not that the Settlement Officer gave or intended to give the widow the right of making a summary settlement as talukdar, but simply desired to place on record for her benefit her admitted beneficial interest in some and some only of the villages which made up the settled taluk."

* * * *

"Mr. Capper seems to have admitted as to the seven villages that though the appellant had not been in independent possession of one-third of the collections, yet that the Rajah might have so bound himself by writing as to have incurred the obligation of accounting to her for one-third of the profits. He ultimately dismissed her suit because her agent had failed to produce a deed in writing so binding the talukdar. Colonel Barrow, however, appears to have held that the admission of the Rajah at the time of the summary settlement and on other occasions, the former being in the nature of an admission on record, were equivalent to such a deed; and that, accordingly, the relation of trustee and *cestui que* trust having so to speak

(1) L. R., 4 I. A., at p. 206.

been established between them, she was entitled to one-third share of the profits of the villages when the annual accounts were made up. In this part of the Financial Commissioner's order their Lordships entirely concur."

This case is, therefore, an authority for the proposition that a person who has been registered as a talukdar under Act I of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly.

In that case the *cestui que* trust was a stranger. In this the plaintiffs claimed as persons constituting with the defendant a joint Hindu family.

It appears that the respondent, in his application for a summary settlement in the case now under consideration, stated that there was no partner of his other than Hardeo Bux, but he said nothing as to Purbut Singh.

On the 22nd March 1866, the plaintiff deposed that he, Purbut Singh, and the respondent all lived together, and had everything in common up to January then last, which was nearly eight years after the date of the summary settlement, and more than six from the date of the sanad.

Their Lordships are of opinion that, up to the time of Lord Canning's proclamation, the whole of the villages mentioned in the summary settlement were the joint family property of the petitioner and Purbut Singh and the defendant, and that they were either ancestral or purchased with the proceeds of ancestral estate. The defendant himself, more than a year after the date of the summary settlement, stated in his deposition on oath made in another case on the 8th July 1859, that the custom prevailing in his family was that if his cousins, meaning the plaintiff and Purbut Singh, who were his partners, should claim, they could get their shares divided. He said, "they at present live with me, and receive food and clothing." It does not appear clearly from the latter words whether the estate was held as joint family property or whether the defendant merely made an allowance to the plaintiffs.

The defendant in his deposition deposed that his statement

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made at the time of the summary settlement referred to Mouza Gungoa only. But that seems to be at variance with the statement itself.

The lower Courts appear to have decided the case merely upon the ground that the defendant was protected by the sanad, without adverting to s. 15 of Act I of 1869, or inquiring whether, notwithstanding the summary settlement, the sanad, and the Statute, the plaintiffs or the appellant had, either before or after the passing of Act I of 1869, acquired or become entitled to a beneficial interest in any part of the property.

Their Lordships are of opinion that, looking to the allegations in the plaint and written statements, an issue ought to have been raised to try that question. They do not, on the materials before them, feel competent to decide it. The defendant's sanad is not on the record. They have no evidence of all the circumstances under which the summary settlement was made, nor of those under which the sanad was granted, nor of what was done with respect to it or the property comprised in it before the registration of the defendant under Act I of 1869.

Their Lordships will, therefore, humbly advise Her Majesty that the Commissioner be directed to try or to refer to the Settlement Officer for trial the following issue, namely, whether the respondent has, in any and what manner, agreed or become bound to hold the villages comprised in the summary settlement and sanad, or any and what part thereof, or the rents and profits thereof, or any and what part thereof, in trust for the appellant and Purbut Singh, or either and which of them; that either party be at liberty to adduce such evidence upon the trial of that issue as he may be advised, and that the finding upon such issue, together with a translation of any additional evidence which may be adduced, be forwarded to the Registrar of the Privy Council, in order to enable the Judicial Committee to report to Her Majesty their opinion upon this appeal.

Agent for the appellant: Mr. *T. L. Wilson.*

Agents for the respondent: Messrs. *Barrow* and *Barton.*

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

GROOM AND ANOTHER *v.* WILSON.

1878
April 8.

Practice—Summary Suit on Promissory Note—Time extended for Defendant to appear and defend Suit—Civil Procedure Code (Act X of 1877), *Chap. XXXIX.*

THE High Court has power to extend the time within which a defendant in a suit brought under chap. xxxix (summary procedure on negotiable instruments) of the Civil Procedure Code can come in and obtain leave to defend: therefore, in a suit in which it appeared that the defendant resided at Peshawur, the time for the defendant to obtain leave from the Court to appear and defend was extended to twenty-eight days.

Mr. *Collis* applied, under cl. 12 of the Charter, for leave to file a plaint under the provisions of chap. xxxix of the Civil Procedure Code on a promissory note made outside, but payable within the jurisdiction; and asked that the summons should issue in accordance with form No. 172 of the 4th schedule to the Code. The defendant was an officer stationed at Peshawur.

PONTIFEX, J., granted leave; but, as the defendant was at Peshawur, directed that the time within which the defendant might obtain leave to appear and defend should be extended to the period of twenty-eight days. The learned Judge was of opinion that, inasmuch as s. 532 provides that the summons shall issue either in the form mentioned in the schedule, or in such other form as the High Court may from time to time direct, the Court had the power to extend the time.

Attorneys for the plaintiff: Messrs. *Roberts, Morgan & Co.*

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APPELLATE CRIMINAL.

Before Mr Justice Ainslie and Mr. Justice McDonell.

1878
Jany. 17.

THE EMPRESS ON THE PROSECUTION OF RAM MANIKYA CHAKROBUTTY AND OTHERS *v.* DONONJOY BARAJ.*

Practice—Distinct Offences—Separate Charges—Criminal Procedure Code—(Act X of 1872), *ss.* 532, 553, 554, *Illus. b.*—555.

Section 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year.

THE letter of reference showed that the accused was tried and convicted by the Deputy Magistrate in eight cases for extorting various sums of money from some villagers; the complainants in each case being separate individuals. Five out of the eight cases were tried on the same day, and so far as can be gathered from the letter of reference, it would appear that each of these cases were tried separately. Separate sentences were inflicted on each case. The accused appealed to the Court of the District Magistrate, who affirmed the order of the Deputy Magistrate. A further application was then made on behalf of the accused to the Sessions Judge, who referred the matter to the High Court under s. 296 of the Criminal Procedure Code, on the ground that the convictions were bad in law. The alleged offences being of one kind and having been committed within one year, it was not open to the Court, under s. 453 of the Code of Criminal Procedure, to draw charges and try the accused at the same time for more than three of such offences.

No one appeared on the hearing of the reference.

The judgment of the Court was delivered by

AINSLIE, J.—We see no grounds for interfering. S. 453 of the Criminal Procedure Code modifies s. 452, which requires a

* Criminal Reference, No. 88 of 1877, from the order of F. H. McLaughlin, Esq., Officiating District and Sessions Judge of Noakhally, dated the 7th December 1877.

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Kennedy.

1878 Dec. 21.

GOOPEE NATH DOBEY (JUDGMENT-DEBTOR) *v.* ROY LUCHMEEPUT SINGH BAHADUR AND ANOTHER (DECREE-HOLDERS.)*

Sale in Execution of Decree—Postponement of Sale—Notice—Proclamation—Act VIII of 1859, *s.* 249.

Where a sale in execution of a decree is postponed, whether indefinitely or to a fixed date, it is necessary, in the absence of an express arrangement between all the parties, that a fresh proclamation should be made giving notice of the day to which the sale has been postponed.

It may be presumed, when the notice is wanting, that there has been an absence of bidders, from which alone substantial injury must probably have arisen to the judgment-debtor (1).

Okhoy Chunder Dutt v. *Erskine* (2) followed.

IN May 1876 Lutchmeeput Singh obtained a decree against the judgment-debtor, under which certain property in the district of Shahabad was attached and ordered to be sold. The 6th November 1876 was, in the first instance, the day fixed for the sale. On the 25th of October the sale was postponed at the request of two rival decree-holders to the 11th December. The order postponing the sale was passed in the presence of the vakeels for the decree-holders, but without the consent of the judgment-debtor and without any notice to him. The proclamation of the postponement was notified simply by a notice to that effect put up in the Court-house, but no steps had been taken to convey information of the change of day to intending purchasers in the mofussil. The sale took place on the 11th December.

The judgment-debtor applied to the District Court to have the sale set aside, on the ground that no fresh proclamation, under s. 249 of Act VIII of 1859, was made of the day to which the sale was adjourned.

* Miscellaneous Regular Appeal, No. 265 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 5th of September 1877.

(1) See also *Shib Prokash Singh* v. *Sardar Dayal Singh*, *post*, p. 544.

(2) 3 W. R., Mis. R., 11.

The Judge, although he found that the judgment-debtor had not been represented in Court at the time when the sale was postponed, refused the application.

The judgment-debtor accordingly preferred this appeal to the High Court.

The *Advocate-General* and Baboo *Gooroo Dass Banerjee* for the appellant.

Moonshee *Mahomod Yusoof*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Sree Nath Dass* for the respondent.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the facts of the case, continued).—The judgment of the late learned Chief Justice Sir Barnes Peacock in the case of *Okhoy Chunder Dutt* v. *Erskine* (1) may be quoted as showing that, in all cases in which a sale may be postponed to another day, it is necessary that the formalities required by law should be gone through afresh (unless it be that they have been waived by the parties themselves). He says—"It is exceedingly important that when an auction-sale is to take place in execution of a decree, a proclamation should be made, giving notice of the day on which the sale is to take place, so that intending purchasers may go and bid for the articles put up for sale, and Act VIII of 1859 is express on the point." He then goes on to quote s. 249.

The case then before the Court is, no doubt, somewhat different from the present case, inasmuch as in that case the postponement had been indefinite, whereas in the present case the postponement was to a certain fixed day. Still it appears to us that the principle applies, that in all cases the prescribed notice must be given in order that intending purchasers may be able to attend and bid at the sale, unless the giving of such notice is specially waived. In the present case there was no such notice as is required by s. 249, though it had become necessary in consequence of the first notice having become inoperative otherwise than by the action of the parties to the suit.

(1) 3 W. R Mis. R, 11.

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With reference to the substantial injury arising from this irregularity, we think that we ought to hold that, as the law distinctly requires a notice, and as the notice is so important, in order to secure a fair chance of a proper price being offered for the property to be sold, it may be presumed, when the notice is wanting, that there has been an absence of bidders from which alone substantial injury to the judgment-debtor must probably have arisen.

There is some evidence, moreover, in this case that the property was sold for less than its actual value. The Judge has rejected that evidence as untrustworthy, but we think that it should be read in the light of the presumption that there must probably be substantial injury from want of notice, and that some weight should consequently be given to that evidence, unless it is clearly rebutted by evidence of the other side. There being no such rebutting evidence, we are bound to hold that there is sufficient proof of substantial injury.

The order of the lower Court must, therefore, be reversed, and the sale set aside with costs payable by the purchaser respondent.

Before Mr. Justice White and Mr. Justice R. C. Mitter.

1878 *Mar.* 20.

SHIB PROKASH SINGH (JUDGMENT-DEBTOR) *v.* SARDAR DOYAL SINGH (DECREE-HOLDER). *

Sale of Property in Execution of Decree—Proclamation of Sale—Materia Irregularity—Act VIII of 1859, *ss.* 249, 256.

The property of a judgment-debtor was proclaimed and advertized for sale in execution of a decree on a certain day. The proclamation set out particulars of the property, but subsequent to such proclamation a portion of the property was released to a third party. Notwithstanding this fact, no fresh proclamation was made, and the sale took place on the day originally fixed. *Held*, that the omission to issue a fresh proclamation was a material irregularity, inasmuch as the judgment-debtor was entitled to have a proclamation issued accurately describing the property to be sold, and that such proclamation should be published thirty days before the sale (1).

* Miscellaneous Regular Appeal, No. 239 of 1877, against the order of Moulvi Mohamed Noorul Hossain, Subordinate Judge of Zilla Shahabad, dated the 19th of May 1877.

(1) See also *Gopeenath Dobey* v. *Roy Luchmeeput Singh Bahadur*, *ante*, p 542.

IN this case the property of the judgment-debtor had been put up for sale in 1877, under a proclamation which bore date the 11th January 1877, and which was published on the 27th of the same month, fixing the 5th March 1877 as the day for sale. The proclamation stated that the property to be sold was a 2-anna 8-pie share in a certain talook, the jumma of which was 1,269 rupees 5 annas and 4 pie. Between the 11th January and 5th March, a portion, consisting of 12 kalums of the property advertized to be sold, was released from attachment upon the application of one Nursing Roy. No fresh proclamation, however, was issued; but, on the date of sale, those who had assembled for the purpose of bidding for the property, were informed, at the time and place of sale, that a portion of the advertized property had been released, and that the sale would therefore, only extend to 2-anna 8-pie share of the talook, less the portion released. A sale having taken place, the judgment-debtor applied to have it set aside for irregularity. The Subordinate Judge overruled the objection.

The judgment-debtor, therefore, appealed to the High Court.

Baboo *Akhil Chunder Sen* for the appellant.

Baboo *Anund Gopal Paulit* for the respondent.

The judgment of the Court was delivered by

WHITE, J. (who, after stating the facts of the case, and the release of a portion of property to Nursing Roy, continued):—The result of the release of this portion was, that the description of the property which was advertised to be sold was no longer an accurate description.

Now s. 249 of the Code, in prescribing what the proclamation is to contain, makes express mention of "the property to be sold," and there can be no doubt that that particular is one of the greatest importance. In a case where, as here, a variation had arisen between the property advertised to be sold and the property actually sold, in consequence of the release obtained by Nursing Roy, it was necessary and proper that a fresh proclamation should have issued in order to comply with

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the requirement of the section to which I have referred. No such fresh proclamation, however, issued; but on the day of sale, those who had assembled for the purpose of bidding for the property were informed at the time and place of sale that a portion of the advertised property had been released, and that the sale would, therefore, only extend to a 2-anna 8-pie share of the talook, less that portion. It is obvious that this was not a compliance with the Code, and that serious injury may have resulted to the appellant from the adoption of such a course. The judgment-debtor is entitled to have a proclamation issued which shall state accurately the property to be sold, and which is published thirty days before the sale. The method adopted deprived him of the benefit of the thirty days' advertisement, and is open to the further objection that intending purchasers were left in the dark as to the extent of the portion which Nursing Roy had procured to be released, and as to how much it reduced the value of the 2-anna 8-pie share of the talook which was advertised for sale That the proceeding, under these circumstances, to sell the appellant's property under the proclamation of the 11th January 1877 amounted to a material irregularity, we think there can be no doubt. The way in which the Subordinate Judge has dealt with the objection is this. He says:—"No rule has been pointed out and urged that in a case like this the writ of attachment and sale proclamation should be served and published anew under that rule. It being so, to call such an omission an irregularity, is altogether false and improper." The objection is not pointed to the omission to issue a fresh writ of attachment, but to the omission to issue a fresh proclamation. A reference to s. 249 of the Code would have satisfied the Subordinate Judge that a fresh proclamation was, in strictness, required, inasmuch as the property actually sold did not correspond with that which was proclaimed to be sold.

The irregularity being in our opinion material, we have next to determine whether the judgment-debtor has proved that he has sustained substantial injury by reason of that irregularity. We can easily suppose that he may have done so, and it is an irregularity of such a sort that very little evidence would satisfy

the Court on the point. It is necessary, however, for him to give some evidence of substantial injury, but this he is unable to do upon the present application, because he cannot show what is the value of the 12 kalums which have been deducted from the 2-anna 8-pie share of the talook.

The Court below does not appear to have examined the evidence with a view to this point, nor indeed did the question properly arise there, because it held that the objection on the score of irregularity failed, in which case, of course, it would be unnecessary to consider whether substantial injury had or had not been suffered by the judgment-debtor.

This question now becomes material, and we think, considering the course which the application took in the Court below, that the judgment-debtor should have an opportunity of substantiating this part of his case. We shall, therefore, with these remarks remand the case to the Subordinate Judge, and direct him to ascertain from the evidence on the record, and from any further evidence that may be adduced by the parties, whether the appellant has sustained substantial injury by reason of the occurrence of the irregularity complained of. The appellant and respondent respectively will have liberty to produce such further evidence.

The costs of this appeal will abide the result of the remand.

Before Mr. Justice Markby and Mr. Justice Mitter.

GOLOKEMONEY DABIA AND OTHERS (DECREE-HOLDERS) *v.* MOHESH CHUNDER MOSA AND ANOTHER (JUDGMENT-DEBTORS).*

1877 *Dec. 6.*

Application for Execution of Decree for Arrears of rent—Limitation—Proper Application—Circular Order, 10th July 1874—Beng. Act VIII of 1869, s. 58.

The words "no process of execution of any description whatsoever shall be issued on a judgment in any suit .....after the lapse of three years" in s. 58 of Beng. Act VIII of 1869 mean that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. Therefore, where, on an application made on 5th July

*Miscellaneous Special Appeal, No. 145 of 1877, against the order of H. T. Prinsep, Esq., Judge of Hooghly, dated 10th March 1877, affirming a decree of Baboo Bepin Beharee Mookerjee, Munsif of Ampta.

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1875, for execution of a decree for arrears of rent, obtained on the 31st January 1873, a warrant for the arrest of the judgment-debtors was issued, but not executed, a subsequent application for execution of the same decree made on 17th March 1876 was held not to be barred.

The law as laid down in *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (1) is not affected by the Circular Order No. 18, dated 10th July 1874 (2).

The facts of this case are as follows:—

On the 31st January 1873, the present appellants, with certain other parties, obtained a decree for arrears of rent against the respondents. On the 5th July 1875, an application was made for execution by arrest and for attachment and sale of the property of the judgment-debtors, and a warrant for their arrest was granted; but on the 22nd September 1875, the decree-holders informed the Court that a proposal for compromise was made by the judgment-debtors, and that their arrest was unnecessary. On the compromise falling through, a second application was, on the 17th March 1876, made for the arrest of the judgment-debtors and for an attachment of their property This application was refused by the Munsif; and on appeal to the District Judge the order was upheld, the Court being of opinion that the matter was barred by limitation under s. 58 of Beng. Act VIII of 1869, and that the Circular Order of the High Court, dated 10th July 1874, which directed attention to the positive rule laid down by that section of the Act, and provided that in respect of judgments therein specified, the same process of execution could not be executed more than once, was intended to apply to cases like that of the application, the subject of the appeal. The decree-holders thereupon appealed to the High Court.

Baboo *Bhairub Chunder Banerjee*, for the appellants, contended, that the application of the 17th March 1876 for the arrest of the judgment-debtors was not barred under s. 58 of the Rent Law, because that application was only a continuation of the former application, and in support of this argument, cited *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (1), and further that

(1) 4 B. L R (F. B), 82, S C., 13 W. R. (F. B.), 3.
(2) 13 B L. R, Cir Or., 62.

the Circular Order of the High Court, dated the 10th July 1874 (1), had been misconstrued by the lower Court, as the Circular simply provides that a process once executed shall not be issued again; but in the present case, as the warrant of arrest was never executed, the Circular does not apply, and further, that the Circular could not set aside the ruling of the Full Bench reported in *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (2).

Baboo *Bordo Nath Dutt*, for the respondents, pointed out that the judgment creditors had allowed so much time to elapse between the two applications that the second application must be taken to be distinct from the first, and therefore was barred, and cited *Lalla Ram Sahoy* v. *Dodraj Mahto* (3).

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts of the case, continued).—In this case we think that the decision of the Munsif and of the District Judge was wrong, and that execution ought to have been allowed to issue.

Now the Full Bench have laid down in a case (2), and that decision is binding upon us, what the true construction of the section is which imposes a term of limitation of three years upon a judgment-creditor when applying for execution. The effect of that decision is stated in the judgment of Mr. Justice Macpherson, who says that "the words should be considered as meaning that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment." That I understand to be the decision of the majority of the Judges of the Full Bench. That being so, the real question which we have to determine in this case is whether the proceeding of the 17th March 1876 was a new and substantive application for execution, or whether it was merely a step taken by the judgment-creditors in furtherance of the execution for which they applied, and applied successfully on the 5th July

(1) 13 B. L. R., Cir. Or., 62.
(2) 4 B. L. R. (F.B.), 82; S. C., 13 W. R. (F.B.), 3.
(3) 20 W. R., 395.

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1875. Now one of the facts to be noticed in this case is, that the proceedings which took place on the 17th March 1876 and subsequent proceedings were all under the original number which was borne by the proceedings of 1875. I do not say that that was conclusive in the matter, but it certainly goes to show that the proceedings which followed upon the application of the 17th March 1876 were not proceedings upon a new execution then for the first time issued, but steps taken in furtherance of the original application. And under all the circumstances of this case, we think that we are justified in saying that the steps taken for the arrest of the judgment-debtors in March 1876 were not new proceedings but a continuation of the old proceedings. If that be so, then, according to the Full Bench decision, it is incumbent upon us to hold that they are not barred.

The District Judge has relied upon the terms of a circular order of this Court. We do not at all wish to weaken the effect of anything which is stated in that circular order. That circular order does not and could not affect the law as laid down by the Full Bench decision. Notwithstanding anything which is contained in that circular order, the question must be decided in the same way, *viz.*, by inquiring whether the application made for execution upon which proceedings were had was made within three years from the date of the decree.

The vakeel for the respondents has also relied upon a decision in *Lalla Ram Sahoy* v. *Dodraj Matho* (1). All that is necessary for us to say upon that decision is this, that the question of delay on the part of the judgment-creditors is not anywhere referred to by the Full Bench. It may be that the question of delay on the part of the judgment-creditors may in some cases be useful in assisting the Court to determine whether an ambiguous proceeding is a fresh application for execution or a step taken in furtherance of a previous application. But there is nothing which will authorize us to impart into the law of limitation the question of diligence on the part of the judgment-creditors as a substantive portion of that law.

(1) 20 W. R., 395.

We think that the decision of the District Judge must be set aside, and the money deposited by the judgment-debtors must be paid out to the decree-holders. The decree-holders will be entitled to their costs in this Court and the Courts below.

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Before Mr. Justice Ainslie and Mr. Justice McDonell.

SHEIKH KHOORSHED HOSSEIN AND OTHERS (DECREE-HOLDERS) *v.* NUBBEE FATIMA AND OTHERS (JUDGMENT-DEBTORS).*

1878 *Feby. 27.*

Suit for Partition†—Execution—Limitation—Right of Co-sharer in Partition—Suit to enforce Decree.

A decree for partition is not like a decree for money or the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.

A, on the 29th June 1871, obtained a decree for partition against *B*, his co-shareholder, and, on the 28th November 1876, applied to have the execution proceedings struck off the file The application was refused, and the partition was ordered to be completed at *B's* expense. *Held*, that as the execution proceedings taken either by one shareholder or the other were taken on behalf of both, limitation did not apply.

IN this suit the plaintiff obtained a decree on the 29th June 1871 against the defendant, his co-sharer, for partition of a 3-anna 6-ganda share out of 8 annas of Mouza Dilawapore. Plaintiff took out execution, and a greater part of the land had been partitioned under the execution; the plaintiff, however, dissatisfied with the way in which the lands had been divided, applied, on 28th November 1876, to have the execution proceedings struck off the file, whereupon the defendant expressed his willingness to carry on the execution proceedings. The Court of first instance rejected the plaintiff's application, and directed the partition to continue at the defendant's expense. The lower

* Miscellaneous Special Appeal, No. 308 of 1877, against the order of R. J. Richardson, Esq., Judge of Zilla Tirhoot, dated the 6th of June 1877, affirming the order of Baboo Greesh Chunder Ghose, First Subordinate Judge of that district, dated the 28th of November 1876.

† The partition under a decree of an estate paying rent to Government is now to be made by the Collector, see s. 265 of the Civil Procedure Code.

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Appellate Court having confirmed this order, the plaintiff preferred a special appeal to the High Court.

Moonshee *Mahomed Yusoof* for the appellants.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the facts of the case, continued).—In special appeal it is contended that the defendant is not entitled to execute the decree at all; and if entitled, that she is barred by limitation.

With regard to the first point, we are of opinion that a decree for partition is not like a decree for money or for the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and having been so made, it is unnecessary for those persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared under a second order made. It must be taken that a decree in such suits is a decree, when properly drawn up, in favour of each shareholder or set of shareholders having a distinct share. In the present instance there being fortunately only two parties, there was no room for ambiguity in the drawing up of the decree.

On the question of limitation, we think that it is impossible, in a case like this, to hold that the execution proceedings taken by either one shareholder or the other are anything but proceedings on account of both the shareholders. The necessary result of those proceedings was to divide off the share of the defendant, and while this was going on at the instance of the plaintiff, it would have been merely superfluous for the defendant to have put in an application to have the same thing done at her instance. Therefore, we think that it must be taken that the proceedings in execution earlier than 1876 have the same effect as if they had been originated in the name of the defendant, consequently limitation does not apply.

The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

THE ADMINISTRATOR-GENERAL OF BENGAL *v.* APCAR.

1878
April 4 & 9.

Will, Construction of—Absolute Gift—Inference drawn by subsequent provision for enjoyment of such gift—Intention of Testator.

Where a testator leaves a legacy absolutely as regards his estate, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails and does not fall into the residue of the testator's estate. Therefore, where a testator gave legacies to certain of his grandsons and granddaughters, but nevertheless declared that such legacies should be held upon trust (as to the legacies to the grandsons) to invest the same and to apply the income during the minority of the legatee towards his maintenance and education, and upon his attaining the age of 21 years to pay him the income during his lifetime, and after his death to pay such income unto the widow of such grandson, and after the death of both of them to transfer the capital unto the child or children of such grandson as being a son or sons should attain the age of 21 years, or being a daughter should attain that age, or marry, in equal shares as tenants-in-common; and where the testator especially provided as to the legacy left to one grandson that upon the happening of certain events it should be paid to his other grandchildren, *Held*, that the gifts to the grandsons were absolute, and that the subsequent provisions were simply a qualification of the gifts for the benefit of the legatees; and that, therefore, upon the death of one of the grandsons unmarried, his legal representative was entitled to the legacy left to him.

Lassence v. *Tierney* (1) and *Kellett* v. *Kellett* (2) followed.

In this case the Administrator-General of Bengal, as legal representative of Paul Apcar, who had died intestate and unmarried in June 1877, sued the defendants as executors of the will of Aratoon Apcar. The testator had died many years ago, and the plaintiff claimed payment of a legacy of Rs. 20,000, to which he contended the estate of Paul Apcar was entitled under his will. The defendants, however, stated that, as the will in question did not direct how the legacy bequeathed to Paul Apcar was to be disposed of in the event of Paul

(1) 1 M. and G., 551. (2) L. R., 3 H. L., 160.

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dying without issue and without leaving a widow, they were advised not to make over the same to the plaintiff without a decree of Court.

The clause of the will relating to the matters in question was as follows:

"I give to each of my grandsons and granddaughters (sons and daughters of my deceased son Apcar Arratoon Apcar), *viz.*, Arratoon Apcar, Gregory Apcar, Alexander Apcar, Paul Apcar, Cachtick Apcar, Johannes Apcar, Sarah Amelia Apcar, and Hanudi or Anne Apcar, now the wife of Mr. G. A. Bishop, the sum of Rs. 20,000. Nevertheless, I declare that the said shares or legacies of each of my said grandsons and granddaughters shall be held by my trustees upon the trusts hereinafter declared concerning the same respectively, that is to say, as to the legacies of each of my grandsons upon trust to lay out and invest the same in the purchase of Government or Parliamentary stocks or funds in India, or Great Britain, or in Bank of Bengal shares or in or upon any mortgage of freehold estate in Great Britain or within the Town of Calcutta or on loan to the firm of Messrs. Apcar & Co., on their own personal security, with power from time to time to vary such investments and during the minority of such grandson in the discretion of my said trustees to apply all or any part of the annual produce and income arising from the said investment in or towards his maintenance or education or otherwise for his benefit and to accumulate the unapplied income. But such accumulations are nevertheless to be paid and applied to or for the future benefit of such grandson, and, after such grandson shall have attained the age of 21 years, to pay the income arising from the said investment to him, during his lifetime (subject nevertheless as to the legacy of my said grandson Aratoon Apcar, to the proviso hereinafter contained), and after the decease of such grandson, to pay the said income unto any wife of such grandson who may survive him during her life, and after the decease of both of them the said grandson and any wife of his who may survive him upon trust to transfer the capital of the said share, and the funds and securities whereon the same may be invested.

unto such child or children of such grandson, as being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age or marry, in equal shares, as tenants-in-common, for the absolute use and benefit of such child or children respectively. The testator then made a limitation over of the legacy to his grandson Arratoon Apcar, and also provided that the trustees should be at liberty if they thought fit to transfer the legacies left to the granddaughters to separate trustees.

Mr. *J. D. Bell* (with him Mr. *Ferguson*) for the plaintiff, contended, on the authority of *Lassence* v. *Tierney* (1), that the Legacy to Paul Apcar was an absolute gift, and that therefore on his death, it did not revert back to the testator's general estate. That the provisions relating to this legacy only showed how it was to the enjoyed by the legatee and in no way cut down the previous absolute gift. The following cases were cited: *Campbell* v. *Brownrigg* (2), *Martin* v. *Martin* (3), *Randfield* v. *Randfield* (4), *Crozier* v. *Crozier* (5).

Mr. *T. A. Apcar*, for the defendants, argued that Paul only took a life-estate in the Rs. 20,000 and, as he died without leaving a widow, the legacy had now lapsed unto the testator's general estate. He further argued that the case of *Lassence* v. *Tierney* (1) did not apply, as that was a case relating to females, whereas the present was one concerning males; and that a testator might well provide that a legacy to a woman should rest in trustees, but there would be no need for such precaution in case of legacies to males. He cited the following cases: *Scawin* v. *Watson* (6), *O'Mahoney* v. *Burdett* (7), *Whittell* v. *Dudin* (8), *Joslin* v. *Hammond* (9).

PONTIFEX, J.—I think that the gift of this legacy of Rs. 20,000 to Paul Apcar, deceased, falls within the rule that, if

(1) 1 M. and G., 551.
(2) 1 Phillips, 301.
(3) L. R., 2 Eq., 404
(4) 8 H. L., 225.
(5) L. R., 15 Eq., 282.
(6) 10 Beav., 200.
(7) L. R., 7 H. L., 388.
(8) 2 Jac., and W., 279.
(9) 3 M. and K., 110.

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a testator leaves a legacy absolutely as regards his estates, but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee upon failure of such objects, the absolute gift prevails—*Lassence* v. *Tierney* (1). In that case, however, Lord Cottenham qualified the rule by adding that the intention of the testator was to be collected from the whole will and not from words, which, standing alone, would constitute an absolute gift, and in that case he found words in other parts of the will which made him decide that the gift in that case was not an absolute one. In *Kellett* v. *Kellett* (2), the rule referred to cases approved and confirmed. In the present case the gift in the first instance is an absolute one, and the subsequent provisions are simply a qualification of the gift for the benefit of the legatee; and so far from finding in any other point of the will any indication of intention on the part of the testator that the gift should not be an absolute gift, I think, on the contrary, that the fact that the testator does make a limitation over of one of their legacies, namely, the legacy to his grandson Arratoon, shows that he intended the other legacies to be absolute, and I think such intention is further indicated by the provision respecting the legacies to the granddaughters under which the executors are empowered to transfer the granddaughter's legacies to separate trustees, which shows that it was the intention of the testator to separate the legacies from his general estate. The Administrator-General is therefore entitled to the legacy of Rs. 20,000 left by the testator to his grandson Paul. Costs of all parties, as between attorney and client, to be paid out of the Rs. 20,000.

Attorney for the plaintiff: Mr. *Carapiet*.

Attorney for the defendants: Mr. *Dover*.

(1) 1 M. and G., 551. (2) L. R., 3 H. L., 160.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice R. C. Mitter.

UBILACK RAL AND OTHERS (PLAINTIFFS) *v.* DALLIAL RAI AND OTHERS (DEFENDANTS).*

1878 *Mar.* 29.

Document more than thirty years old, Presumption as to—Evidence Act (Act I of 1872), s. 90—Proof of execution—Authority to sign on behalf of others, proof of.

The plaintiffs sued the defendants for enhancement of rent. The defendants resisted the claim, relying, *inter alia*, on a mokurri pottah executed on 9th October 1832. This pottah purported to bear the seal of one of the then maliks of the lands, and also purported to be signed on behalf of all the maliks by *A*. *Held*, that although the pottah might be an authentic document, it would not bind the maliks who did not affix their seals, nor those who claimed under them, unless it was shown that *A* had a special authority to sign the names of such maliks to it or a general authority to sign on their behalf documents of the same description as the pottah, and that until such proof was given, the document was not admissible in evidence. *Held* further, the fact that the pottah was more than thirty years old gave rise to the presumption that the signature at the foot of it was in the handwriting of *A*, and that the pottah was executed by him; but that to make it evidence against the representatives of the maliks who had not executed it, the defendants should show that *A* had authority to sign their names.

The facts of this case are as follows:—

The special appellants, the plaintiffs in the first Court, sued the respondents, the defendants in that Court, to enhance the rent of a piece of land.

The defendants successfully contended in both the lower Courts that they were protected from enhancement by reason of a mokurrari pottah executed as far back as the 9th October 1832, or forty-three years before the suit. The maliks of the land at that time were Futtey Ali, Bisharut Ali, and Khoda Buksh. The pottah purported to bear the seal of Futtey Ali, but not of the

* Special Appeal, No. 391 of 1877, against the decree of Baboo Greesh Chunder Ghose, Subordinate Judge of Zilla Tirhoot, dated the 9th of December 1876, affirming the decree of Hafeez Abdool Kureem, Munsif of Hajeepore, dated the 24th of March 1876.

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other maliks. It purported, however, to be signed on behalf of all the maliks by one Shyam Lall.

The Court below considered the seal of Futtey Ali was proved by comparing it with a seal on a duly registered document of 1236 B.S. (1830), and held the mokurrari pottah to be proved for the reasons which sufficiently appear in the judgment of the Court. The appellants in special appeal objected that the Court had omitted to find that Shyam Lall was authorized to sign the pottah on behalf of Bisharut Ali and Khoda Busksh.

Baboo *Prannath Pundit* for the appellants.

Mr. *H. E. Mendies* for the respondents.

The judgment of the Court was delivered by

WHITE, J. (who, after stating the facts of the case, continued):—So far as the pottah bears the seal of Futtey Ali, we have no reason to find fault with the mode by which the Court below has arrived at the conclusion that the seal was the genuine seal of Futtey Ali, but inasmuch as besides Futtey Ali, there were two other maliks, who have not sealed or signed the pottah, the authority of Shyam Lall to sign for them should be proved; and such proof is a necessary preliminary to the admission of the document in evidence.

The Judge states thus—"The issue which I have to try is the mokurrari pottah genuine; and if so, was it effectuated or not." What the Judge says on this issue is this:—"The evidence adduced on behalf of the pottah is fully satisfactory. True that no direct evidence was given to establish its authenticity, but it is also true that no direct evidence was available. The pottah is more than forty years old. The writing of the lease was proved by the evidence given by Soonder Lall, the son of Shyam Lall, the writer of it. The seal of Ali Buksh, *alias* Futtey Ali, on the pottah is, on comparison with another seal impressed on a document of 1236 (1830), which was duly registered, inferentially proved. Defendants' possession of the lands under the said pottah has also been proved. From these significant facts the inference is irresistible that the pottah is

true. Now a few words will do to dispose of the objections advanced against it,—(1) All the maliks did not sign the lease. True that all of them did not, but it is also true that one of them, Futty Ali, did; and Shyam Lall, their chief officer, signed for them. The evidence of the impression of one of the maliks' seal proves its authenticity beyond all doubt."

Although the pottah may be an authentic document, it will not bind the maliks who did not affix their seals, or those who claim under them, unless it is shown that Shyam Lall had authority to sign their names As regards the authority of Shyam to bind these two maliks, all that is found in the passage I have read, from which such authority can be inferred, is that "Shyam Lall, their chief officer, signed for them."

That in our opinion is not sufficient. It was necessary to show either that Shyam Lall received a special authority from these two maliks to sign their names to this document, or that he had a general authority from them to sign on their behalf all documents of the same description as this pottah. Until such proof was given, the pottah was not admissible in evidence. The fact that it was more than thirty years old only gave rise to the presumption mentioned in s. 90 of the Evidence Act,—namely, that the signature at the foot of the pottah which purported to be in the handwriting of Shyam Lall was in his handwriting, and that the execution which on the face of the pottah appears to be the execution of Shyam Lall was an execution of the pottah by him. To make the pottah evidence against the two maliks who did not execute it, and those claiming through them, the defendants must go further and show that Shyam Lall had the authority of those two maliks to sign their names.

This point is of such vital importance in the case that although it has been pressed upon us on behalf of the defendants that there is a great deal of evidence in support of the view that Shyam Lall had the requisite authority, we have thought it desirable to remand the case for an express finding of the lower Appellate Court on the point. As the lower Appellate Court did not have its attention specially drawn to the point, we annot treat any conclusion that it has come to,

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or any inference that may be drawn from the facts referred to by the defendants' vakil, as satisfactorily establishing that Shyam Lall was duly authorized. We are also influenced in remanding the case by the further circumstance that the Judge appears to have been under the erroneous impression that there was no direct evidence available to establish the authenticity of the pottah. [The rest of the judgment is not material to this report.]

Case remanded.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

1878 *Jany.* 9.

ZOOLFUN BIBEE (DEFENDANT) *v.* RADHICA PROSONNO CHUNDER (PLAINTIFF).*

Right of Occupancy—No Title in Landlord—Title by Possession—Beng. Act VIII of 1869.

A ryot occupying and cultivating land for more than twelve years under a landlord who has no title to the land, nevertheless acquires a right of occupancy. The right is not one conferred by any lessor. It is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating the land for twelve years or upwards and paying rent due thereon.

Syud Ameer Hossein v. *Sheo Suhae* (1) followed.

IN this case the plaintiff sued to recover possession of certain lands by establishing his title as auction-purchaser. The plaint stated that the lands, the subject of suit, were *julpai* (2) lands of certain mouzahs, which had been given up by the Salt Agent, and that, on the abolition of the salt agency, the Collector had settled all the *julpai* lands with the zemindars; that default in

* Special Appeal, No. 308 of 1877, against the decree of L. R. Tottenham, Esq., Judge of Zilla Midnapore, dated the 21st November 1876, reversing the decree of Baboo Jibun Kristo Chatterjee, Munsif of, Namal, dated the 27th September 1875.

(1) 19 W. R., 338; see also *Pandit Sheo Prokash Misser* v. *Ram Sahoy Singh*, 8 *B. L. R.*, 165.

(2) *Julpai* lands are those subject to inundations by the sea, and from which salt is procurable. *Mudur* means good arable soil, as opposed to *julpai*.

the payment of the arrears due being made, the *julpai* mehal was brought to sale and purchased by the plaintiff; and that the defendant was an occupant of the land in question without any title, and would not allow the plaintiff to take possession.

The defendant contended and sought to prove that the lands in dispute were not part of the *julpai* lands, but were *mudur* lands of Mouza Raipore. He further alleged that the estate in which the said lands were included had been let in farm to one Rutnahari Pahari, who had sublet a portion comprising the lands in dispute to one Jonab Ali as a jote, and that the defendant had subsequently purchased the jote tenure from Jonab Ali and had been in possession since the time of such purchase.

The Court of first instance found upon the evidence that the lands in dispute were parts of the *julpai* lands as mentioned by the plaintiff, and that they were not *mudur* lands as pleaded by the defendants. Further found that the defendant, and her vendor Jonab Ali, long held possession of the disputed lands, by cutting jungle and constructing *kherry* (1) bunds, and bringing them under cultivation at heavy expense; and that the defendant had been in possession for about seventeen or eighteen years, and that Jonab Ali was in possession during the Salt Agent's time. On these grounds it decided that the plaintiff was entitled to such proprietary possession as is exercised by a superior landlord, but that the defendant should continue in possession as jotedar having acquired occupancy rights. The plaintiff appealed in respect of this latter portion of the judgment, and the District Judge allowed the appeal for reasons which sufficiently appear in the judgment of the High Court, to which the defendant appealed.

Mr. *R. E. Twidale* (with him Moulvie *Mahomed Yusouf*) for the appellant.

Baboo *Bhowany Churn Dutt* for the respondent.

(1) An artificial lake or reservoir, a tank

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ZOOLFUN BIBEE v. RADHICA PROSONNO CHUNDER.

The judgment of the Court was delivered by

JACKSON, J. (who, after stating the facts, continued) :—Against the latter part of the judgment the plaintiff appealed to the District Court, and the effect of the District Judge's judgment was this—that although the defendant might have held this land and paid the rent for twelve years and more, yet that, as she was not paying to the plaintiff, but held the land as a portion of a different estate, the right of occupancy, which the Rent Law recognizes and affirms, could not grow up in such circumstances. He says: "The defendant's jote is in the *mudur* land, and her "encroachment on *julpai* land, over which neither she nor her "vendor had any right, cannot give her a right of occupancy: "she was simply a trespasser." He went on: "The finding of "the lower Court, that the land is part of the *julpai* estate, is "tantamount to a finding that the defendant is only a trespasser. "The respondent's pleader argues that, as she was acknowledged "as a tenant by her lessor, she cannot be treated as a trespasser "and ejected, but the party whose tenant she is, had no right in "the *julpai* lands, and he could not confer on her a right which "he did not himself possess." It is clear from that, that the defendant had not ousted any person who was a rightful jotedar or tenant or anybody else; but that he had taken a lease of these lands from a person claiming to have a right, and, as such lessee, had occupied and presumably paid the rents. Now that a person occupying land under one who is not the rightful landlord does, nevertheless, acquire a right of occupancy, is most clearly laid down by Phear and Ainslie, JJ., in the case of *Syud Ameer Hossein* v. *Sheo Suhae* (1), which was apparently a case in direct analogy with the present. In a suit between the zemindars of one estate and the proprietors of another, it had been fairly proved and determined that the land, the subject of the suit, belonged to the plaintiffs; and upon their contending in the suit, which was then before the Court, that even if the defendants had culti-

(1) 19 W. R. 338: see also *Pandit Sheo Prokash Misser* v. *Ram Sahoy Singh*, 8 B. L. R., 165.

vated for twelve years under the maliks, they could acquire no right of occupancy, inasmuch as the maliks had no title, the learned Judges held, "the mere fact that the person to whom "he for some years paid rent had no title cannot take away from "him the character of ryot or prevent him from counting those "years in the time necessary to give him a right of occupancy "under Act X of 1859." In that decision, as at present advised, we entirely concur. The Judge, it appears to me, states a fallacy when he speaks of a lessor conferring on the ryot a right which he does not himself possess; that is not a right conferred by any lessor. It is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating land for twelve years or upwards and paying rent due thereupon. It appears to me, therefore, that the lower Appellate Court is mistaken; that the judgment of the Judge, therefore, must be set aside, and the judgment of the Court of first instance restored with costs.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby.

PANCHCOWRIE MULL AND OTHERS (PLAINTIFFS) *v.* CHUMROOLALL AND OTHERS (DEFENDANTS).

1878. *Feb.* 14 *&* 18 *and March* 1 *and April* 1.

Suit for Management of a Religious Endowment—Advocate-General a party to such Suits—Ambiguous Description of Plaintiff—Jain Sect—Hindu Law—Sebait—Jurisdiction of High Court—Religious Endowments Act XX of 1863.

The plaintiffs, describing themselves as the Calcutta Tairo Pantee Anungo Punch Brethren, in whom (as they alleged) was vested the management and control of the temples, endowments, and worship of the Degumbery Sect of Jains and who formed the committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, brought a suit, praying, *inter alia*, for the construction of a will and for a declaration of their rights thereunder as members of the said Punch, and to have property dedicated by the will to religious purposes ascertained and secured. *Held per* KENNEDY, J., in the Court below, that the description of the character in which the plaintiffs sued was uncertain and ambiguous; that, inasmuch as the property in question was not *dewutter*, the plaintiffs were not sebaits, and all they could claim, therefore, was a right of management; and that a mere manager, without some special power which the Hindu law confers on sebaits, could not institute such a suit; that the plaintiffs not

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being a corporation could not sue in a corporate character; that assuming religious endownments had been created by the will, leave to bring the suit should have been obtained under s. 18 of Act XX of 1863; and that if the gifts in the will could be treated as charitable bequests, possibly the Advocate-General could sue. *Held* on appeal, reversing the decision of the lower Court, that the right in which the plaintiffs sued was sufficiently shown, and that the object of the suit was not to assert any personal right of ownership in the plaintiffs. *Held* further, that the Advocate-General was not a necessary party, although it was desirable that such suits should be brought only with his consent, or by the leave of the Court. *Held* further, that suits of this description do not fall under Act XX of 1863, but come under the ordinary jurisdiction of the Court, inherited from the Supreme Court, and conferred upon that Court by its Charter—a jurisdiction similar in its general features to that of the Lord Chancellor in England (1).

Ganes Sing v. *Ramgopal Sing* (2) dissented from.

APPEAL from a decision of KENNEDY, J., dated the 20th August 1877.

The suit was one for the construction of a will, to have certain property dedicated by the will for religious purposes ascertained and secured, for an account, for a receiver, and for other relief; but the only question material to this report was as to the right of the plaintiffs to maintain the suit. The 1st and 2nd paragraphs of the plaint were as follows:—

"The plaintiffs are the persons who constitute the Calcutta Tairo Pantee Anungo Punch Brethren, the said body being a

(1) Chapter XL, s. 539 of the Civil Procedure Code (Act X of 1877) provides, that suits relating to charities may be broughtb ythe Advocate-General acting *ex-officio*, or by two or more persons having a direct interest in the trust, the leave in writing of the Advocate-General having been first obtained.

In England the Attorney-General, representing the Crown in its capacity as *parens patriæ*, may exhibit informations on behalf of an individual, the object of a general charity. The person who puts the Attorney-General in motion is termed the 'relator,' and although he is commonly required for the purpose of securing costs, yet the Attorney-General may proceed without a relator (*In the matter of the Bedford Charity*, 2 Swanst., 471—520); and when he does, he is entitled to his costs (*Attorney-General* v. *Draper's Co.*, 4 Beav., 305). By the Code the Advocate-General is not empowered to move on behalf of a third party, nor is there any provision for payment of costs which may be incurred by him in charity suits.

(2) 5 B. L. R., App., 55.

body in which is vested the management and control of the temples, endowments, and worship of the Degumbery Sect of Jains, and which body forms the committee for the management of all the Jain Charities as well in Calcutta as in all the other towns and places in India.

"The only other Tairo Pantee Anungo Punch in the Presidency of Bengal is the punch of and at Ferozabad, near Agra, in the North-Western Provinces of India; but all the Jain temples and charities in India are under the management of the said Calcutta Punch, and by the usages and customs of the Janis a member of one Punch becomes, on going to any town where there is a Punch, entitled, by virtue of his being a member of the Punch at one place, to become and act as a member of the Punch of any and every town to which he may happen to go."

The plaint then stated that one Hoolaseelall, a prominent and wealthy member of the said sect of Jains, died in Calcutta on the 21st of December 1826, after making a will, by which, among other things, he directed, with respect to a six-anna share of his business in Calcutta as follows:

"Six annas my own. The profit that shall accrue any year, the same you will disburse for dhurrum (piety) as follows: Particulars,—two annas profit to Sri Munderjee of Calcutta of the Tairo Pantee Jainee Anungo, which you will appropriate for the expenses of its poojarees (persons performing poojah), and tailookas (drudges), and repairs and articles for poojahs; the mooktears to apply the same are the Punch Brethren of the Tairo Pantee Anungos. Two annas you will appropriate for the expenses of Sri Seehorjees Mundeers (temples), poojarees, tailookas, nowbutkhannah repairs, gomastah, and articles for poojahs. Two annas at Purajabad, &c., to the Sadharmee Brethren; such Brethren as go there on pilgrimage, you will give to them in a suitable manner, and will expend all this in the matter of the sadhram: if there be loss, then you will write such against my name in my six annas Puttee: if there be profit in the six annas, you will appropriate the same for the aforesaid expenses."

By his will the testator also dedicated various other properties, and gave various other bequests to and for charitable

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purposes and pious acts; and then gave the following direction: "And the sums for pious uses that I have directed to be applied by different persons: if any of them shall not apply any sum, or shall keep back any, all the Tairo Pantee Anungo, Brethren of all the towns have the power to cause the same to be applied or to exact an account thereof."

The testator appointed one Hursahay Ghose and one Luchmeechand executors of and trustees under his will, and they both obtained probate of the will and took possession of all his estate; and on the death of Luchmeechand the whole of it came into the possession of Hursahay Ghose, who continued to carry on the business of Hoolaseelall. The defendants were Chumroolall, Dhunnoo Baboo, an infant, and Sreemutty Monee Bibee, the widow of one Indro Chund Baboo. Indro Chund Baboo was the only son and sole heir and representative of Hursahay, and the executor of his will, and had taken possession of all his estate, among other of all the property belonging to the estate of Hoolaseelall. The defendant Chumroolall was one of the two sons, and Dhunnoo, the grandson by the other son of Indro Chund Baboo, who had come into possession of all the estate of Indro Chund, and, as part of it, of the property of which the plaintiffs claimed a share and an account.

The plaintiffs stated that they were desirous, as members of the Calcutta Tairo Pantee Anungo Punch Brethren, of having the will of Hoolaseelall construed, and of having their rights as such Punch ascertained and declared, and of having the property dedicated to the said religious purposes and pious acts ascertained and secured.

The defendants, in their written statement, set up the defence that the plaintiffs had no cause of action; and on the case coming on for settlement of issues, the question was raised whether the suit as framed could be maintained.

Mr. *Branson* and Mr. *Jackson* for the plaintiffs.

The *Advocate-General* (Mr. *Paul*) for the defendant Chumroolall.

Mr. *Stokoe* for the defendant Dhunnoolall.

KENNEDY, J.—I do not know that I have ever met a document much more difficult to understand than the will produced in this case. Indeed, the interpreters who have had the duty of preparing the translations annexed to the plaint, seem, in some portions of it, to have abandoned the task as hopeless, and marked the passages as unintelligible. As matters stand, however, I feel myself relieved from the necessity of trying to ascertain the meaning of this will, for, in my opinion, the plaintiffs have no such interest as entitles them to maintain a suit.

The plaint sets out in the two first paragraphs the alleged position of the plaintiffs. I may observe that I think if there were no other objection to the suit, it would be difficult to maintain it with so uncertain and ambiguous a description of the character in which the plaintiffs sue, and of the nature and constitution of the body to which they belong ; and this is something more than a mere technical objection, for, if the account in the second para. be true, every member of every Punch in India is in fact a member of the Punch here, and ought to be joined in order to bind him, as well as for other reasons.

I asked Mr. Branson if he thought himself able to contend that the property in this case was *dewutter*, and he practically relinquished that contention ; which, indeed, I think on the words of the will, would have been wholly untenable. We, therefore, have not the plaintiffs in the position of sebaits, and they do not claim,—and it is clear that, on the terms of the will, they could not claim,—property in the subject-matter of the suit ; all they claim, or could claim, is a right of management. Well, I confess that it is a little new to me to find a suit for property instituted by a mere manager without some special power. The Hindu law does confer such power in the case of a sebait (if in truth he be a mere manager) ; but then the property is vested in the deity, and the sebait merely represents him. Here, the property not being *dewutter*, it is not vested in any one, and the only claim is to have the right of management, which is not alleged to have been vested in them under the provisions of Act XX of 1863. It seems to me that this, in itself, is a sufficient objection to the present frame of this suit ; see *King of Spain* v. *Machado* (1).

(1) 4 Russ., 225.

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There is, however, a further difficulty, which seems to me insuperable; it was that, which was most strongly pressed by Mr. Advocate-General; and I did not hear any answer to it from Mr. Branson, save a faint suggestion as to the possible difference of Indian law. It is this: the plaintiffs sue not in their own individual right, but as the persons constituting the Calcutta Punch; they do not allege that they were the persons who constituted it at the time of the testator's death, and as that occurred more than fifty years ago, it is in the highest degree improbable that any of them were. They sue, therefore, it would seem, not in their individual, but in their supposed corporate capacity. There is no allegation that they have been legally incorporated, and it is improbable that they have been. Well, in *Lloyd* v. *Loaring* (1), the Chancellor distinctly held that the Court ought not to permit persons to sue in a corporate character who do not fulfil it. That is a statement of the law of the Courts in Westminster Hall, thence of the Supreme Court, and derivatively of this Court. It does not come within any of the classes in which native laws are reserved, and if it did, nothing has been suggested to me to show that Hindu law is different in this respect.

Mr. Branson's strong point was that every mode of procedure was so beset with difficulties that he was unable to find an available course. I think it possible that there may be none. The provisions of the will are so confused and absurd that it is quite possible that there may be no person in a position to put them in force; but Mr. Justice Norman, in the case of the Sikh Sungut in Calcutta—*Ganes Sing* v. *Ramgopal Sing* (2)—has held, and in my opinion rightly held, that the provisions of Act XX of 1863 apply to religious endowments in the Presidency towns, and to persons who are *de facto* trustees, &c. If this were a correct view of the case, the defendants or some of them, might (if any liability attaches on them, and if there be any religious endowments created by the will) be sued as trustees under the 14th section; but in that case preliminary leave under the 18th section would be necessary. If these can be treated as not religious but charitable gifts, possibly the

(1) 6 Ves., 773. (2) 5 B. L. R App., 55.

Advocate-General could sue; but when I am asked to take the accounts of a trade for upwards of fifty years, in order to carry out and define the trusts of an unintelligible will, I confess that, even if it were not rather inconsistent with my judicial duty to become the adviser of the plaintiffs, and to point out to them a safe course of procedure if any such exist. I should not feel particularly anxious to give them any advice in this matter. My duty is simply to decide upon their present suit, and this seems to me untenable; and, if they even are able to get over these difficulties of form, I think they will probably find others of substance lying behind, with which, however, I have at present nothing to do. I must dismiss this suit.

From this decision the plaintiffs appealed.

Mr. *Branson* and Mr. *Jackson* for the appellants.

The *Advocate-General* (Mr. *Paul*) for the respondent Chumroolall.

Mr. *Stokoe* for the respondent Dhunnoolall.

Mr. *Jackson* contended that the suit was maintainable in its present form, and referred to the cases of *Ganes Sing* v. *Ramgopal Sing* (1), *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally* (2), *Jeyangarulavaru* v. *Sri Hati Durma Dossji* (3), and *Lloyd* v. *Loaring* (4).

The *Advocate-General* was called on for the respondent Chumroolall.—The plaintiffs here affect to have the whole right of action in themselves, but they only have it jointly with others, *viz.*, the rest of the members of the Punch; see Mitford on Pleading, 4th ed., p. 164. The will does not give them any right to an account except in a suit brought by all the members of the community. No such right is given by the will to the Calcutta community alone; nor could such right be given, as a corporation cannot be created by will, and the plaintiffs are suing here as a corporation, a course which in *Lloyd* v. *Loaring* (4) was not allowed.

(1) 5 B. L. R., App, 55.

(2) 15 B. L. R., 167.

(3) 4 Mad. H. C., 2.

(4) 6 Ves, 773.

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The suit is not maintainable even as to the jewellery, as to which there is no allegation that it was ever vested in the plaintiffs.

Mr. *Stokoe* for the respondent Dhunnoolall.—The plaintiffs say they have the management and control of the property, but not that they have any interest in it. The suit, if bad, should not be amended as in *Lloyd* v. *Loaring* (1), for here the plaintiffs do not sue as having any interest: they have no *locus standi* as trustees of the sect, or as managers of the fund. Such a body has no legal existence, and can have no legal rights; see Lewin on Trusts, 6th edition, pp. 75 and 805.

A reply was called for only on the point as to how far the decision in *Ganes Sing* v. *Ramgopal Sing* (2) would affect the case.

Mr. *Branson* in reply contended that that decision did not govern the case at all. Act XX of 1863 did not apply. That Act only applies to endowments, &c., to which the regulations it repeals applied. The plaintiffs do not sue under the provisions of that Act, and that Act cannot take away any right to sue which the plaintiffs may otherwise have. It is an enabling Act, and persons can sue under it, who could not otherwise have done so. This endowment never came under the control of the Board of Revenue, and therefore Act XX of 1863 does not apply to it; see *Kuneez Fatima* v. *Saheba Jan* (3), and *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally* (4). The subject of suit here could not have been the subject of a public endowment. The case of *Delroos Banoo Begum* (4) has been upheld by the Privy Council. [The *Advocate-General* pointed out that s. 14 was the first section of the Act in which the word "such" was not used; the word there used was "any," which was very wide.]

Cur. adv vult.

The judgment of the Court was delivered by

GARTH, C. J. (who, after shortly stating the nature of the suit as appearing from the plaint, continued:—The learned Judge

(1) 6 Ves., 773.

(2) 5 B. L. R., App., 55.

(3) 8 W. R., 313.

(4) 15 B. L. R., 183.

in the Court below has dismissed the suit (without settling any issues, and without going into evidence), as we understand, upon four grounds,—

1*st.*—That the plaintiffs do not show in what right they sue.

2*nd.*—That the plaintiffs are not a corporation, and cannot therefore claim to hold property by succession.

3*rd.*—That the Advocate-General is not a party to the suit.

4*th.*—That no leave of the Court to bring the suit has been obtained under s. 18 of Act XX of 1863.

The right in which the plaintiffs sue is, in our opinion, sufficiently shown. They describe themselves as the persons forming for the time being the Tairo Pantee Anungo Punch Brethren, and as such they claim to have, on behalf of themselves and others, the general management and control of the religious endowments belonging to the Degumbery Sect of Jains. They also show that the bequests, which they seek to enforce, are bequests which the testator directed to be applied under the management and direction of this very same Punch, to certain purposes connected with the worship of this sect. So far, therefore, there appears to us to be no objection to the frame of the suit. Of course, when the issues are properly framed, the plaintiffs will have to prove this part of their case.

The next objection to the suit, in our opinion, also fails. We do not consider the object of the suit to be to assert any personal rights of ownership in the plaintiffs whatsoever. If any part of the plaint is ambiguous in this respect, all doubt as to this might have been removed when framing the issues. What the plaintiffs substantially seek, is to have the trusts of the will, in which they are interested (not beneficially, but as the representatives of their sect), ascertained, and the performance of these trusts secured.

Nor do we consider that the practice of this Court requires that the Advocate-General should be a party to a suit of this description. We have inquired into the matter, and, as far as we have been able to discover, this is not necessary. For example, in 1861, we find a person named Nolbindoff filing a bill on behalf of himself and all the other Armenian inhabitants of New Naukchewan in Russia, to enforce certain bequests to

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the institutions of that city; and he only alleged, as his title to bring the suit, that he was one of the inhabitants. In this case a scheme was drawn up and a decree made, without any concurrence of the Advocate-General.

The last objection is, no doubt, supported by the authority of Mr. Justice Norman; but having carefully considered the Act XX of 1863, we are unable to agree in the view that it was intended to apply to such a suit as this. The first thirteen sections of the Act clearly do not apply, and although the language of s. 14, which empowers any person interested in a religious endowment to sue a trustee, is general in its terms, yet we do not consider that the Legislature had in its contemplation to interfere with the procedure of the Supreme Court in reference to trusts concerning property, which could not, under any circumstances, come under the direct control of Government. Such a suit as the present is not brought under Act XX of 1863, but under the ordinary original jurisdiction of this Court, inherited from the Supreme Court, and conferred upon the Supreme Court by its Charter—a jurisdiction similar in its general features to that of the Lord Chancellor in England; see *Attorney-General* v. *Brodie* (1).

At the same time, whilst we believe that this is the correct view of the law as it stands at present, we cannot help thinking it extremely desirable that suits of this kind to enforce trusts which are of a public character should only be brought either by the consent of the Advocate-General or by the leave of the Court. Such suits are very often vexatious and open to abuse, and we consider that a procedure similar to that which is provided by Act XX of 1863, for suits to which that Act extends, might usefully be applied to all suits of this nature. This of course could only be effected by legislative interference.

We think that the learned Judge was wrong to dismiss the suit upon the grounds stated by him. The decree will, therefore, be set aside, and the suit remanded to be heard upon its merits.

The costs of the appeal will be costs in the cause.

Case remanded.

(1) 4 Moore's I. A., 190.

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Magistrate to summon the witneses that might be offered by the accused, and that he might at his discretion have adjourned the case.

Held further *per* JACKSON, J., that the meaning of s. 359 of the Criminal Procedure Code is, that if among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material; but that the section is not intended to enable the Magistrate to enquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witneses cited by the accused and further, that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence.

Held further *per* JACKSON, J., that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the proceduer, was illegal.

Held per CUNNINGHAM, J., that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence.

Held further *per* CUNNINGHAM, J., that the acts of the complainants in erecting the *nawbut-khana* amounted to mischief, and came within the purview of s. 425 of the Penal Code.

Held further *per* AINSLIE and MCDONELL, JJ., that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who, having a right of appeal to the Sessions Court instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to.

IN this case a piece of land was the joint property of Gopee Kisto Gossain and Shama Churn Lahirie and a third party, who took no part in these proceedings. Shortly before the Durga Poojah Holidays, 1876, a dispute arose between Gopee Kisto Gossain and Shama Churn Lahirie in consequence of the latter having erected a *nawbut-khana*, or platform for musicians resting on bamboo posts, on a portion of the joint piece of land, to which the former objected. Hearing of this dispute, the Magistrate of the subdivision held an enquiry and made an order under s. 530 of the Code of Criminal Procedure, adjudging exclusive possession of that part of the land on which the *nawbut-khana* stood to Shama Churn Lahirie. On this Gopee Kisto Gossain instituted a suit in

the Court of the Subordinate Judge, the object of which was to have it declared that he, Gopee Kisto Gossain, was entitled to joint possession over the whole of this piece of land, and that Shama Churn Lahirie was not entitled to erect a *nawbut-khana* thereon; and it was specially prayed that this declaration should be granted, and that the *nawbut-khana* should be broken down. On the 19th May 1877 the Subordinate Judge made a decree, which was in terms that the plaintiff's suit be decreed.

In September 1877 the *nawbut-khana* not having been taken down by Shama Churn Lahirie in compliance with the decree of 19th May, some servants of Gopee Kisto Gossain went to the place and pulled it down. On this, upon the complaint of Shama Churn Lahirie, the men who had pulled down the *nawbut-khana* were brought before the Deputy Magistrate, and on the 28th September 1877 convicted of the offence of mischief under s. 425 of the Indian Penal Code and fined.

On the morning of the 8th of October 1877, some servants of Gopee Kisto Gossain, including the petitioners in the present case, seeing some *gharamis* in the employment of Shama Churn Lahirie engaged in re-erecting this *nawbut-khana*, not only protested against the erection, but pulled down the bamboos, thrusting aside the servants of Shama Churn Lahirie, and throwing to the ground one of them who had claimed up on one of the bamboos and refused to come down.

On the forenoon of the 9th October complaint was made by Shama Churn Lahirie to the Joint-Magistrate, who at once summoned the accused; and, on their being brought before him on the same day, at first proposed to deal with the case summarily; but this course being objected to by the pleaders of the accused, he proceeded to frame a charge under s. 141 and s. 147 of the Indian Penal Code, and then and there called upon the accused for their defence. Several witnesses were named for the defence, and summonses for their attendance were issued next morning. These witnesses not having been found, the accused, on the 12th, applied to the Joint-Magistrate for further time, representing that the time was that of poojah, and they had not had a fair opportunity for procuring the attendance of their witnesses. The Joint-Magistrate declined to allow further time and pro-

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ceeded to convict the prisoners of the offence of rioting under s. 147 of the Indian Penal Code, and sentenced each of them to rigorous imprisonment for three months.

The prisoners, without appealing to the Sessions Court, on the 26th October, moved the High Court (White and McDonell, JJ.,) under cl. 15 of the Charter, to send for the records; and obtained a rule calling upon the complainant Denonath Ghattack to show cause why the sentence passed should not be set aside, and the High Court directed the prisoners to be released on bail. On 18th January 1878 the rule came on for argument before Ainslie and McDonell, JJ., and was discharged. The learned Judges delivered the following judgments :—

"AINSLIE, J.—Mr. Justice White has expressed a wish that this matter should be disposed of by this Bench. I am of opinion that this Court cannot interfere in the exercise of its powers of extraordinary jurisdiction, unless all other remedies provided by law have been exhausted. The petitioners in this case clearly have the remedy of an appeal. Therefore, until that remedy has been resorted to, this Court, in the view I take of the proper application of cl. 15 of the Charter, ought not to interfere.

"Whether, under any circumstances, it would do so, I need not say. The rule will be discharged. I concur in the suggestion of my learned brother as to the propriety of admitting an appeal, should the petitioners think fit to tender it, and in suspending the execution of the Magistrate's order for one week from this date."

"McDONELL, J.—I have only to add that Mr. Justice White entirely concurs in the view taken by my learned brother Ainslie; and that had it been brought to our notice that there was an appeal, we should not have granted the rule. At the same time, we think that the Judge would exercise a wise discretion if, under the circumstances, he would admit the appeal after time.

"The applicants are at present on bail, and if they do not appeal within one week from this date, the sentence will be carried out."

An appeal was, accordingly, presented to the Judge of Hooghly On 5th February 1878 that learned Judge dismissed the appeal, enhancing the punishment to six months' rigorous imprisonment, and further directed that proceedings should be taken against Goopee Kisto Gossain, the employer of the accused, and also against Nundolall Gossain, his son.

A rule to show cause why the conviction should not be quashed having been granted by the High Court (Jackson and Cunningham, JJ.), the records were sent for and the matter came on for argument.

Mr. *J. D. Bell* (with him Baboo *Sreenath Chunder*) for the complainant showed cause.

Mr. *Branson* (with him Mr. *Jackson* and Baboo *Troyluckonath Mitter* and Baboo *Obhoy Churn Bose*) for the prisoners.

Mr. *Bell.*—The destruction of the nawbut-khana was mischief under s. 425 of the Penal Code. [JACKSON, J.—We must take it as being found by a competent Civil Court that Goopee Kisto Gossain was entitled to joint possession of the whole parcel of land.] Although he may have a certain right, still he cannot take the law in his own hands, and enforce it as was done here. If we had acted contrary to or inconsistently with the Civil Court's decree, the Civil Court could have been appealed to, and an injunction to stop proceedings obtained. Section 425, para. 2, applies to property held joint. [Mr. *Branson.*—The nawbut-khana itself was not joint property.] Again, the conduct of the other side amounted to criminal trespass under s. 441. [CUNNINGHAM, J.—If co-proprietors disagree as to the enjoyment of joint property and a row ensues, can that be called a riot?] Yes, assuming there was an unlawful assembly, each member of it is guilty of riot. Granting the other side had a right, they sought to enforce it by means which amount to criminal force as defined by s. 350. Bamboos were pulled down, our servants thrust aside, one man thrown to the ground. Clearly this was criminal force, and as it was committed when more than five persons were present, it amounted to an unlawful assembly, and the parties are, therefore, guilty of riot. As to

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procedure, no material injury has resulted from evidence not being called, as it would not have altered the Magistrate's finding. Moreover, the witnesses were summoned, and although they were in Serampore, they did not choose to appear.

Mr. *Branson*.—It is not clear that five persons were present; if not, then there would be no unlawful assembly. With the exception of a man being pushed aside there was no force; if there had been, the police would have interfered. We were entitled under the decree of the Civil Court to pull down the *nawbut-khana*, although it would have been more regular if the decree had contained a mandatory injunction directing its removal. Admitting five of our servants were present, still that would not be an unlawful assembly, as they were only removing a nuisance: Blackstone's Commentaries, 3rd vol., fifth edition, p. 354 (1). The question to be considered is, who had the legal title to the land? *Lows* v. *Telford* (2). Here the men were protecting their master's property, and cannot therefore be considered as forming an unlawful assembly: *Shunker Singh* v. *Burmah Mahto* (3). We were protecting our property and, endeavouring to prevent mischief being done to it; in fact exercising the right of private defence, and that cannot be said to amount to criminal force—*Brijo Singh* v. *Khub Lall* (4).

As to procedure, the accused were prejudiced in their defence by not having their witnesses examined, as their testimony might have been most material.

Cur. adv. vult.

The following judgments were delivered.

JACKSON, J. (after stating the previous proceedings as set out above, continued as follows):—It appears to me in the first instance that the Joint Magistrate was in error in making any order in this matter under s. 530 of the Code of Criminal Procedure. It seems to me that the subject-matter was one to which that section could have no application. There was really

(1) 11 Q. B., 904 (*reads* at p. 909).
(2) L. R. 1 App. Ca., 414 (*reads* at p. 418).
(3) 23 W. R., Crim. Rul., 25.
(4) 19 W. R., Crim. Rul., 44.

no question of possession. The land was in the joint possession of the disputants, and the only question was whether one of them being a joint owner was at liberty to make use of the land in such a manner as to cause what the other joint owner chose to consider an annoyance, and against the will of that joint owner. In fact, the Magistrate himself, in a passage of his judgment, seems to furnish an excellent reason why he should not have exercised jurisdiction under that section. Adverting to an argument of the pleader for the accused, as to the right of Goopee Kisto Gossain to forbid this mode of enjoyment, he says:—" I am unable to accede to the application of this doctrine. The vakeel says that the doctrine would be monstrous that a co-sharer might build a house upon land held in joint partnership for his sole use," and so on. Then he goes on to say: " The objection does not apply here, for a nawbut-khana is not a house; it is the flimsiest and most unsubstantial of structures. It occupies the air rather than the earth. It is an elevated platform on which musicians may sit. The grass can grow under it, and goats and cattle graze there." The Magistrate's own argument, therefore, was, that Shama Churn Lahiree, in erecting this nawbut-khana, proposed to occupy the air; and although s. 530 applies to land and water, it certainly does not comprehend the air. I have no doubt that the order under s. 530 was beyond the power of the Magistrate, and ought not to have been made. The Magistrate, however, not only made that order, but has relied upon it in the proceedings now before us, because he has ordered a copy of it to be filed on the record, although it is manifest, from what afterwards took place, that the order had ceased to have any effect whatever, because the result of the order which he made was that Goopee Kisto Gossain, being affected by it, immediately brought a suit in the Civil Court, and that Court declared that the defendant had no right to erect the nawbut-khana in that situation, and in fact decreed that it should be removed. But as an order under s. 530 is only valid until the person to whom possession is given is ousted by due course of law, and as the affect of that judgement of the Civil Court certainly was to oust Shama Churn Lahiree, the order of the Magistrate ought not to have been

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referred to in any further proceedings. That decree of the Civil Court has not, I understand, been set aside on appeal. But whether it has been appealed or not, and whatever may be the result of such appeal, it is not our business at present to consider the correctness of that decision. Undoubtedly, as far as the parties were concerned, it was a valid decision of a competent Court, and the Magistrate, as well as the parties, were bound to respect it. In respect of what occurred in September 1877, it appears to me that the first conviction by the Deputy Magistrate was erroneous. The accused persons were convicted of mischief by the Magistrate. Now, the definition of 'mischiefs' is to be found in s. 425 of the Indian Penal Code, which is this: "Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." Now, as far as I can see, the only act done by the accused persons in that case was to change the situation of the bamboos (because they were not otherwise destroyed or injured) in so far as to put an end to their continuance in the form of structure. Then, looking to the words 'wrongful loss' as defined in s 23 of the Indian Penal Code, we have,—"wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled." Now it is clear from the decision of the Civil Court, which was then in force, that Shama Churn Lahiree was not at that time legally entitled to have those bamboos put together in that place in the form of a nawbut-khana, and consequently there was no causing of wrongful loss in the act done by the accused persons. It seems to me, therefore, that if that conviction had been brought before this Court in the exercise of its power of revision, the conviction would have been set aside. But the employer of the accused appears throughout these proceedings to have been singularly ill-advised. He had an illegal order made against him under s. 530, which was allowed to remain untouched. He brings a suit in the Civil Court, of which he fails to obtain the full effect. His servants illegally suffer conviction of the offence

of mischief, and that conviction is also allowed to pass unquestioned. He seems to have been then advised to cover this piece of ground with logs of wood and bricks and other materials, which was undoubtedly an unjustifiable act. His servants being then charged with rioting, it appears that their counsel, instead of simply relying upon the decision of the Civil Court, thought fit to argue before the Magistrate at length as to the question of right. Finally, upon the conviction taking place, instead of going at once to the Appellate Court, the accused were advised to come before this Court—a procedure which, undoubtedly, prejudiced them in the mind of the Sessions Judge, and which has added very much to the cost and anxieties of these proceedings

I am now coming to the particular proceedings which are before us. These petitioners were charged with the offence of rioting. Now, first as to the procedure, it appears to me that the accused were undoubtedly prejudiced by the haste with which the prosecution was pushed on. I am unable to see for what public object this was done, or what was the particular importance of the case to which the Magistrate refers. It seems to have been, in the eyes of the Magistrate, of particular importance that the employer of the accused persons should not gain his object, and from that it seems to result that he thought it of great importance that the complainant should gain his object,—that is to say, whatever the result of this prosecution might be, Shama Churn Lahiree, the virtual complainant in this case, should be enabled to erect and keep erected this nawbutkhana for such purposes as he thought desirable; and the Magistrate, in a passage of his explanation, which was submitted to this Court some time ago, says that on looking back to the proceedings he is unable to see what other course he could have taken. I confess it does seem to me strange considering that this question had been already submitted to a Civil Court which was competent to entertain it, and that that Court, whether rightly or wrongly, had determined that Shama Churn Lahiree was not entitled to that particular form of enjoyment; it does seem to me strange that it should not have occurred to the Magistrate that the right solution of his difficulty would be

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to restrain Shama Churn Lahiree from doing that which the Civil Court had decided he was not entitled to do, until at any rate, a further decision upon the matter should have been obtained.

I have now to observe upon the refusal of the Magistrate to allow time to the accused for the appearance of their witnesses. The Magistrate, and I observe also the Sessions Judge, relies upon the alleged discretionary power of the Magistrate in this matter. Now, this being what is termed a warrant case, the duty of the Magistrate in this particular is stated in the 219th section of the Code of Criminal Procedure. That section says :—"The Magistrate shall, subject to the provisions of s. 362, summon any witness, and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time as may be necessary." S. 362 says :—"In warrant cases the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary. The Magistrate shall also, subject to the provisions of s. 359, summon any witness and examine any evidence that may be offered on behalf of the accused person, to answer or disprove the evidence against him, and may, for that purpose, at his discretion, adjourn the trial from time to time." S. 359, to which reference is there made, says :—"If the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice," he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. Now, I understand this s. 359 to mean that if, among the persons named by the accused as witnesses to a defence, the Magistrate considers that any particular witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material. I have never heard that it was intended by that provision to enable the Magistrate

to enquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused. I am aware of no warrant for the exercise of any such sweeping authority. Setting that aside, can it be said here that there was any purpose of vexation or delay for which these witnesses were summoned. The trial was proceeding with great rapidity. The offence of which these prisoners were charged was very serious; the law enabled them to call witnesses in order to disprove or answer the case made against them; and considering what the time of the year was at which the first attempt to procure the attendance of these witnesses had been made, it does seem to me that it would have been reasonable to allow a further time for that purpose; and I moreover think it probable that, by reason of such time not having been allowed, the prisoners were prejudiced in their defence, because this was not a simple question, it was one which depended somewhat upon minute considerations. The conduct of the parties, the mode in which one side or the other had acted, was of the greatest importance in determining firstly, whether the accused had committed any offence or not; and secondly, what was the nature and extent of that offence. The Magistrate indeed says, in order to justify his refusal, that the accused had confessed that with which they were charged. The accused had confessed no such thing. They were charged with nothing. That which they admitted was that they had pulled up these bamboos and displaced the erection. That was a long way from confessing the offence of rioting.

Another point on which I think we are bound to remark is that the Magistrate, having at his command the means of obtaining evidence which was presumably impartial,—that is to say, the evidence of his own police officers,—did not either call or examine any one of them. The witnesses for the prosecution were, I believe, only two; and I should have expected, in a case like this, that the Magistrate should have resorted to the evidence of the police officers as presumably free from having any bias on one side or the other. So far as to the procedure in this case.

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I now turn to the conviction. The accused have been convicted of the offence described in s. 147 of the Indian Penal Code. After a good deal of consideration, I am unable to satisfy myself that that which they did came under that section. Rioting, according to the Indian Penal Code, consists of force used in the prosecution of a common object of an unlawful assembly. We must, therefore, find that there was an unlawful assembly, that they had a common object, and that force was exercised in the prosecution of that object. Now, I think it highly probable that, on this occasion, there were five or more persons assembled; but who were these persons? They were not persons assembled together for any unlawful purpose, nor were they persons summoned together for the purpose of committing a breach of the peace. They were the ordinary servants, and probably, relatively speaking, only a few of the ordinary servants of this Baboo Goopee Kisto Gossain. One of them discovers that stealthily the other party had, in the course of the night, put up this structure, which the Civil Court had declared he was not authorized to do, and he calls other servants to assist him in remonstrating, and in removing this structure which was there illegally erected. It was suggested that this matter came either under the third or fourth clause of s. 141. Now, the third clause specifies the object to be that of committing any mischief or criminal trespass or other offence. In regard to mischief, as I have already said with reference to the previous conviction, it appears to me that there was no mischief. In regard to criminal trespass, the allegation appears to me to be absurd. The accused persons were only where they were entitled to be—on their master's own land. They had not gone there, nor did they remain there, for the purpose of trespassing or for any other unlawful purpose. Then it is said that perhaps they had gone there for the purpose of enforcing some right or supposed right. It seems to me they had not gone there for any such purpose, but that the other side having gone there for the purpose of enforcing a right which he perfectly knew the Court had adjudged him not to possess, these persons, merely representing their master, went there for the purpose of resisting that infraction of their

master's right. It is admitted that no particular force or violence was used, and that this was the case might be further inferred from the fact that the police officers who were on the spot saw no occasion to interfere. It appears to me, therefore, that there was no cause for convicting these persons of the offence of rioting, inasmuch as they were not there as members of an unlawful assembly, nor for any unlawful purpose. I think, therefore, that the conviction, as well as the procedure under which the conviction was had, was illegal, and ought to be set aside.

I have only now to make one or two observations upon what had occurred in the Court of Session. The errors into which the Magistrate has fallen are easily explained by the circumstance that he felt himself, whether rightly or wrongly, impressed with the duty of maintaining not only the peace of the district, but also the authority of his own Court, and also by the fact that he had taken a large part in previous transactions which led up to this conviction, and therefore that which he did, although it was, as I think, erroneous, was far from unnatural. But these considerations do not apply to the Courts of Session. The Sessions Judge was an officer of infinitely more experience. He was not affected by the necessity of maintaining the authority of the Magistrate's Court, or by any participation in the previous proceeding, and yet he not merely fails to point out the mistakes which the Magistrate had committed, but he actually goes beyond him in the line which the Magistrate adopted The Joint Magistrate had certainly shown that he was not slow to vindicate the respect due to his own Court, and he passed what he avowedly considered a severe sentence when he punished the petitioners with rigorous imprisonment for three months. I am quite unable to see upon what grounds, or for what reasons, the Sessions Judge not merely affirmed but doubled that punishment. I think, therefore, that this rule must be made absolute, and the conviction and the proceedings quashed. The proceedings taken by the Joint Magistrate against Goopee Kisto Gossain and Nundo Lall Gossain must accordingly be stopped.

CUNNINGHAM, J.—I concur in setting aside these convictions. The facts in the case establish that certain co-owners were

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doing that, in the enjoyment of the common property, which, as between the parties, had been decided by a competent Court to be, and therefore must be regarded by us as being, illegal,—*viz.*, erecting a platform, the erection of which the Court had forbidden. Therefore, the other co-owners came in, and without violence or unnecessary force, and with no breach of the peace, abate the nuisance by pulling up certain bamboos of which the structure, so far as the building had gone, consisted. For this they have been convicted of being members of an unlawful assembly, and sentenced to three months' imprisonment. This sentence was on appeal enhanced to six months.

It appears to me that the accused were merely exercising the remedy familiar to English law of abating a private nuisance. This right is thus described in Stephen's Commentaries, 5th edition, Vol. III, p. 354 :

The rule was laid down by Lord Denman in *Perry* v. *Fitzhowe* (1). In that case a commoner, whose right of pasturage was interfered with by a building erected upon it, came and pulled it down "about the plaintiff's ears" while he and his family were actually in it, and it was held that the serious risk of human life involved, and the consequent imminent danger to the peace had, according to the analogy of the law of distress, the effect of rendering the plaintiff's act unlawful.

In the present case there appears practically to have been no violence and no real danger of any breach of the peace. Indeed, the police were standing by and looking on while the abatement took place; and the act of abatement was, therefore, in my opinion, legal.

The same view of the law appears to be reproduced in the Indian Penal Code. "Mischief" is defined in s. 425, Indian Penal Code, as the causing of any change in property in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, with an intent to cause wrongful loss to any person." And Explanation 2 shows that mischief may be committed by an act affecting property of which the person committing it is joint owner with others. Under this

(1) 8 A. & E., 757.

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definition the act of the complainants in erecting the structure was, as I regard it, mischief.

Then, by s. 99, Indian Penal Code, there is a right of self-defence of property, moveable or immoveable, against an act which falls under the definition of "mischief." I do not think that the third exception in s. 99 applies, as the accused had the right to prevent the structure being made which they could not have done if they had waited to go to the Court for an injunction.

The observations of Couch C.J., in a similar case—*Birjoo Singh* v. *Khub Lall* (1)—seem applicable to the accused in this case.

Under this view, I think the accused were exercising a legal right of self-defence; consequently, that there was no criminal force, no unlawful assembly, and no riot, and the conviction must be quashed.

PRIVY COUNCIL.

WOOMA DAEE (PLAINTIFF) *v.* GOKOOLANUND DASS (DEFENDANT.)

P. C.*
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Jan. 17 *and* 18, *Feb.* 5.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Benares School—Succession—Priority of Indigent Daughter—Barren Daughter—Adoption—Dwyamushyana—Son of Brother—"Factum valet."

In the case of inheritance by daughters on default of nearer heirs, no preference is awarded by the authorities recognized by the Benares school of Hindu law in Upper India to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

Passages in the Dattaka Mimansa and the Dattaka Chandrika, which prescribe that a Hindu wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious Hindus as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

**Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

1 19 W. R., Crim. Rul., 66.

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The maxim *quod fieri non debuit factum valet* is recognized to some extent by other schools of law in India besides that of Bengal.

Semble.—Under the law of the Benares school a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy.

THIS was an appeal from the decision of a Division Bench of the Calcutta High Court, dated the 8th March, 1875, reversing a decision of the Subordinate Judge of Cuttack.

The appellant, who was the plaintiff in the first Court, brought the suit in which the appeal arose against her younger sister Parbutti Daee and against Gokoolanund Dass Mahapatra, the present respondent, as defendants. She set forth in her plaint that her father Hullodhur Dass Mahapatra died in 1870, leaving her and her sister Parbutti, but no male issue; that, inasmuch as her sister was married and in affluent circumstances, she, the plaintiff, being indigent, was, under the Mitakshara law, her father's heir; that on her father's death the defendant Gokoolanund falsely alleging himself to be the adopted son of Hullodhur had obtained a certificate of heirship under Act XVII of 1860, had entered on possession of the estate of the deceased, and obtained registration of, his name as proprietor of certain lands belonging thereto. She therefore sought for a declaration of her right of inheritance to set aside the certificate of heirship obtained by Gokoolanund and the order under which his name was registered as proprietor, and to recover possession of her father's estate.

The defendant Parbutti urged in her written statement that the plaintiff had received money and maintenance from her father, whereas she herself was in indigent circumstances, and that she was the mother of sons, while the plaintiff was a sonless widow; under these circumstances she contended that she had a preferential claim to succeed to her father's inheritance. With reference to Gokoolanund, she denied that he was the adopted son of Hullodhur or in any way related to him, and alleged that he was a stranger from the North-Western Provinces, who had been supported by Hullodhur out of charity.

The defendant Gokoolanund alleged that he was the son of a kinsman of Hullodhur, and had been adopted by Hullodhur.

He admitted that the plaintiff was the indigent daughter of Hullodhur, but denied that, having regard to his own adoption, she had any right to her father's estate.

The Subordinate Judge framed issues as to the fact of the adoption and its validity and effect, and a further issue as to which of Hullodhur's daughters would be entitled to the succession in case it should appear that there was no adoption, or no valid adoption. On the evidence he found that Gokoolanund had lived for many years with Hullodhur, by whom he had been brought up and treated as a son; that he had been recognized by others as the adopted son of Hullodhur, and had been so styled by Hullodhur himself in a petition filed by him in the Magistrate's Court. He nevertheless held that the fact of an adoption had not been established. In arriving at this conclusion, he relied on the *primâ facie* improbability of an adoption having been made under the circumstances shown in evidence, and on the insufficiency of the proof of necessary religious ceremonies. He further held that the adoption, even if it had been proved to have been made, would have been invalid, inasmuch as at the time when it was said to have taken place, one Dinobundhoo, the son of a brother of Hullodhur, was living, during whose lifetime the adoption of any one else was invalid under the Hindu law recognized by the Benares school by which the case was governed. On this point he referred to the Dattaka Mimansa and to Sutherland's Synopsis of the Hindu Law of Adoption, p. 180, of Baboo Kishen Kishore Ghose's edition. He also held that the plaintiff was proved to be indigent, while there was no such proof as to her sister Parbutti, and that the former was consequently entitled under the law of the Mitakshara to succeed to her father to the exclusion of the latter. He accordingly gave a decree in her favour.

The defendant Gokoolanund appealed to the High Court, where the case was heard by a Division Bench (1).

The High Court held that the adoption of Gokoolanund by Hullodhur had been sufficiently proved, and that there was

(1) 15 B. L. R., 405.

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evidence of the appropriate religious ceremonies having been performed. They also held that the adoption was not invalid by reason that at the time when it took place a son of a brother of Hullodhur was in existence. On this point the Court observed that there was no evidence of Hullodhur's brother having been willing to permit the adoption of his son; but supposing him to have been willing, it did not follow that the strict rule laid down by the texts of the old Hindu writers, and by Mr. Sutherland in his Synopsis, was of such binding operation as to invalidate the adoption by Hullodhur of another person, such adoption being otherwise regularly made. In support of this view the Court referred to Sir Thomas Strange's Hindu Law, Vol. I, p. 85.

On the question as to the plaintiff's right of suit the Court observed that it was unnecessary for them to decide that point since they had upheld the adoption, but they intimated their opinion that since the plaintiff was a sonless widow, her sister Parbutti would take in preference to her (in support of which view they cited Mr. Justice Strange's Manual of Hindu Law, p. 80, paras. 328, 329), and, at any rate, that Parbutti would be entitled to an equal share.

From this decision the plaintiff brought the present appeal to Her Majesty in Council.

Mr *Leith* Q. C., and Mr. *Doyne*, for the appellant, contended that on the evidence the High Court was wrong in holding Gokoolanund's adoption proved, as the necessary religious ceremonies had not been observed. But assuming the fact of the adoption, it was invalid in law, since at the time it was made there was in existance a son of the whole brother of the adopter, who under the law of the Benares school was the only proper person to be adopted. See the Dattaka Mimansa, s. 1, sls. 28, 29, 30, 31, 67, and 74; and the Dattaka Chandrika, s. 1, sls. 20, 21, 22, 27, and 28. The view taken by Mr. Sutherland in his Synopsis is grounded on these passages.

There is no authority for the contention that the appellant is excluded from her father's inheritance as being a sonless

widow. See Mitakshara, ch. II, s. 2, paras. 1-4, and ch. I, s. 3, para. 11. The plaintiff as an indigent daughter is entitled to her father's succession in preference to her sister who is wealthy: MacNaghten's Principles of Hindu Law, p. 22.

Mr. *Arathoon*, who appeared for Gokoolanund Dass Mahapatra, was informed by SIR J. COLVILE that their Lordships did not think it necessary to hear him as to the fact of the adoption or the due observance of ceremonies; but desired to hear him as to whether the adoption was not bad by reason that a brother's son had been passed over, and as to the plaintiff's right of suit.

Mr. *Arathoon* contended that the passages cited from the Dattaka Mimansa and Dattaka Chandrika did not bear out the view put forward by Mr. Sutherland in his Synopsis, that there was a rigid rule of law vitiating any adoption but that of a brother's son where such a son existed. He referred to Sir Thomas Strange's Hindu Law (Ed. 1830), Vol. I, pp. 84-85, and to the opinions of Messrs. Colebrooke and Ellis in Vol. II of that work, pp. 98, 99, 103, 104, and 108. At any rate, there must be a brother's son who is available for adoption, and here it was not shown that Denobundhoo could have been lawfully adopted, or that his father would have consented to such an adoption. The act of adoption if duly completed could not be undone, the maxim *factum valet* applying in the Benares as well as in the Bengal school. See Strange's Hindu Law, Vol. I, p. 87, and MacNaghten's Principles of Hindu Law, p. 68.

In support of the contention that the plaintiff had no right to sue, he referred to the Smriti Chundrika, ch. XI, s. ii, paras. 21, 28, as showing that barren daughters are not entitled to inherit their father's estate, since they are incapable of conferring spiritual benefits upon him through their offspring. See also Strange's Hindu Law, Vol. I, p. 138; Norton's Leading Cases, pp. 515, 516; Strange's Manual, paras. 328, 329.

Mr. *Leith* in reply.—The case is governed by the law of the Mitakshara. The Mitakshara divides daughters into two

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classes only, the maiden and the married. There is no exclusion of widows, though childless. On this point the law of Benares and that of Bengal differ. The only distinction which the Mitakshara recognizes in the case of married daughters is in giving priority to such as are indigent. There is no authority for the view put forward by Sir Thomas Strange (Hindu Law, Vol. I, p. 138), that widowed daughters are postponed to those whose husbands are living. If there be any difference on this point between the law of Madras and Benares, we are here governed by the latter. The Smriti Chandrika relied on as an authority for excluding a sonless widow is opposed to the Mitakshara, and is of no authority out of Madras. The words of the Mitakshara which require the adoption of a brother's son are express. The maxim *factum valet* is not a doctrine of the Benares school. MacNaghten's Principles of Hindu Law, p. 5. The contrary view which MacNaghten put forward at p. 68 of the Principles, rests on the opinions of Messrs. Colebrooke and Ellis, cited by Strange, Vol. II, pp. 98, 99, 103, 104, 108. These opinions are supported by no authority. The passage in the Mitakshara referred to by Colebrooke at p. 103, Vol. II, of Strange, does not bear out his view, which is opposed to that taken by the Pundit in the same case. In the only decided case referred to by MacNaghten, at p. 68 of the Principles, it was held that where a brother's son exists, the adoption of any one else is illegal.

Cur adv. vult.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—The general question raised by this appeal is who was entitled to succeed to the estate of one Hullodhur Dass Mahapatra, an Oorya Brahmin, who died in December 1870. He left by his wife Jumoona, who predeceased him some four years before that date, two daughters—Wooma Daee, the plaintiff in the cause, and Parbutti Daee. Both had been married, but Wooma Daee was a childless widow, dependent upon and living with her father at the time of his death, whilst

Parbutti was and is living with her husband, a man of some substance, by whom she had had children, still living. He also left the defendant, Gokoolanund Dass, who claimed to be his son by adoption.

In January 1871 the last-named person applied to the Judge of Cuttack for a certificate under Act XXVII of 1860. His claim was resisted by Parbutti, who disputed the adoption, and also by Hurrihur Persad Dass, the great-nephew of the deceased. The Judge held that the latter had no *locus standi* as an objector; and as between Parbutti and Gokoolanund, decided that the latter had *primâ facie* established his title as the adopted son of the deceased, and granted the certificate to him.

Wooma Daee was no party to this proceeding, of which the effect was at most to confirm or put Gokoolanund in the possession of the property as the heir of Hullodhur, until displaced by a decree in a regular suit.

In June 1872 Wooma Daee instituted the present suit against Gokoolanund and Parbutti, seeking, as between herself and the latter, to be declared the preferential heir of their father, and impugning the adoption of the former, to recover the estate from him. The questions raised in the cause are determinable by the law of the Benares school.

That law, in so far as it supports the claim of the plaintiff to succeed to her father's estate in default of son, natural or adopted, is thus laid down by Sir William MacNaghten (Principles and Precedents of Hindu Law, p. 22). After stating the rule of the Bengal school, he says: "But there is a difference in the law as it obtains in Benares on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that in default of indigent daughters, the wealthy daughters are competent to inherit; *but no preference is given to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.*" Nothing addressed to their Lordships at the bar induces them to think that this is an incorrect exposition of the law. Mr. Arathoon, indeed, in support of his contention that the plaintiff had lost whatever right to inherit

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her father's estate she would otherwise have possessed by reason of her being a childless widow, relied upon some passages in the Smriti Chandrika (Chap. xi, s. 21, paras. 21 and 28), in which the author of that treatise adopts and affirms the rule of the Bengal school in respect of the disqualification of a barren daughter. But on these it is sufficient to observe that, according to Mr. Colebrooke and other high authorities, the Smriti Chandrika contains an authoritative exposition of the law only as it prevails in the south of India, and consequently that the passages in question are of no weight when set against the propositions which Sir William MacNaghten has deduced from the text of the Mitakshara and other authorities recognized by the Benares school. That the plaintiff, as conpared with her sister, is an indigent, or, in the words of the Mitakshara, "an unprovided daughter," seems to be clear. Their Lordships, therefore, though in the view which they take of the other issues it is not necessary to affirm her title as against her sister conclusively, will assume that she has shown a sufficient title to maintain this suit against the defendant Gokoolanund, and to put him to proof of his alleged adoption.

Two distinct issues have been raised touching this adoption:—(1) Whether it was ever made in fact, (2) whether, if so made, it is good in law. And as to the first issue it is to be remarked that the plaintiff has not been content to rely on any deficiency in the proof of the defendant's case. She has set up, and undertaken to prove, a substantive case of her own.

The case of the defendant is, that he was by birth the second son of Nath Dass, a distant kinsman of Hullodhur Dass; that at a very tender age he was taken into the house of Hullodhur with a view to his being adopted; that when about five years old, and in the year 1837, he was formally given by his natural, and received by his adoptive father in adoption with the requisite ceremonies; that he was brought up and educated by Hullodhur as his adopted son, receiving from him at the proper age the investiture of the Brahminical thread, and being on a subsequent occasion given in marriage by him; that after he reached man's state he continued to be recognized in the family as the adopted son, and took part in the management of its affairs, and that in

the character of adopted son, he performed the funeral ceremonies of Jumoona, and afterwards of Hullodhur himself.

On the other hand, the case of the plaintiff is that the defendant is not the son of Nath Dass; that he was by birth a Kanouj Brahmin, or other native of the North-Western Provinces; that when young he was brought by other pilgrims to Juggurnath, and left at first in a sort of hospice attached to the temple which belonged to the elder brother of Hullodhur; that he afterwards lived in the house of one Hira, who is stated to have been a concubine of Hullodhur; that he was never on terms of commensality with Hullodhur; that we never was, and, being the son of an unknown father, never could have been adopted by Hullodhur; that it was only as a gomashta or dewan that he ever took part in the management of Hullodhur's affairs; that Hullodhur, some years after the alleged adoption, really adopted one Radakrishna, a son of one Bhika Das, who subsequently died; and that Hullodhur's funeral rites were performed by the plaintiff and the persons authorized by her to do the acts which a female cannot herself do.

Their Lordships might fell it difficult to pronounce with confidence for themselves which of these conflicting statements, supported as each is by the testimony of numerous witnesses, and in a greater or less degree by documentary evidence, is true. And their difficulty would be greatly increased if one of the Indian Courts had broadly affirmed the truth of the plaintiff's statement, whilst the other Court had pronounced in favour of the defendant. But that is not the way in which the case comes before them. The Subordinate Judge, though he decided against the fact of the adoption, did not affirm that the original *status* and subsequent history of the defendant were what the plaintiff's witnesses represented them to have been; he did not find that Radakrishna (as to whose adoption the evidence is of the most loose and general character) was ever adopted by Hullodhur; he did not find that the plaintiff, and not the defendant, performed the funeral rites of Hullodhur. It cannot therefore be said that the Judge before whom they were examined has pronounced the plaintiff's witnesses to be worthy, and the defendant's witnesses to be unworthy, of credit. On the contrary

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(giving, perhaps, a little more weight to some supposed admissions by two of the plaintiff's witnesses than their words warrant), he expressed his belief "that the defendant Gokoolanund had for years lived with, and been brought up, and treated as a son, and married by Hullodhur." He held "it also to be clear from the evidence tendered for the defence that the defendant had frequently been acknowledged by others as the adopted son of Hullodhur, and was even so styled by Hullodhur himself in a written statement filed by him in an Act IV of 1840: case before the Magistrate of Balasore." We have therefore the Judge of first instance affirming, contrary to the general evidence on the part of the plaintiff, facts most material to the defendant's case, and the genuineness of the documentary evidence produced in support of it. His finding against the fact of adoption proceeds upon the improbability that in 1837 Hullodhur, who might reasonably hope to beget, would adopt a son, upon the discrepancy between certain of the defendant's witnesses as to the presence of Nath Dass at the ceremony, and upon the insufficiency of proof that all the requisite ceremonies were performed.

In this state of things their Lordships, at the close of the appellant's case, intimated that they could not see their way to a reversal of the very clear finding in favour of the fact of adoption to which the High Court upon a review of the whole evidence had come. Their Lordships conceive that the High Court was right in giving credit to the defendant's witnesses rather than to those of the plaintiff, who have disposed to a case which appears to be in many respects a false one. Their evidence is strongly corroborated, as the Subordinate Judge himself admits, by the documents to which he has given credit; and it seems to their Lordships to prove, as found by the High Court, the performance of the requisite ceremonies with as much certainty as can be expected some thirty years or more after the event.

Against a case so proved, the *primâ facie* improbability of the adoption on which the Subordinate Judge so strongly relies cannot, in their Lordships' opinion, weigh very heavily. It must be recollected that it is met not merely by the story of

the inference drawn by a pundit from the horoscopes of the husband and wife (a circumstance which, if it really occurred, might have had considerable force upon superstitious minds), but also by the fact that Hullodhur and Jumoona had lived together as man and wife for a good many years before the final adoption without having issue.

Their Lordships must, therefore, deal with this case on the assumption that the fact of the defendant's adoption has been established.

The question whether such an adoption is valid in law is of greater difficulty, and, being one of general application, of far greater moment. It was in order to consider more fully the authorities cited upon this point that their Lordships reserved their judgment.

The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullodhur's sapindas, made in violation of the preferential right of Dinobundhoo, the only son of Juggunnath, who was Hullodhur's brother by the whole blood, to be adopted.

The plaintiff relies mainly upon certain texts of the Dattaka Mimansa, and the Dattaka Chandrika, of which the former is considered by the Benares school to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st, and the 67th slokas or paragraphs of the second section of the Dattaka Mimansa; and the 20th, the 21st, the 22nd, the 27th, and the 28th paragraphs of the first section of the Dattaka Chandrika.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindoo wishing to adopt a son shall adopt the son of his whole brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father, by saying that, in the case of a brother's son, he should, nevertheless, be adopted in preference to any other person as a *dwyamushyana*, or son of two fathers.

The grave question, however, that arises in this case is

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whether the injunctions just referred to are merely binding upon the consciences of pious Hindoos as defining what they ought to do, or so imperative as to have the force of laws, the violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or at least the last of them, may well be qualified by the incontestable fact that Hullodhur was separate in estate from his brother Juggunath. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have been deduced by the ancient commentators with what logical sequence it is unnecessary to consider, from a text of Menu, which says:—"If one among brothers of the whole blood be possessed of male issue, Menu pronounces that they all are fathers of the same by means of that son." The direct consequence of this might well be that in an undivided family (the normal state of a Hindoo family) the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property, in the absence of male issue, would pass to his coparceners by survivorship. But in the case of a separated Hindoo, the right of performing his obsequies, with the consequent right of succession, is, in the absence of male issue, in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a *Dwyamushyana* there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William MacNaghten at p. 71 of his Principles and Precedents. And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails by such an adoption to perpetuate his own line of male succession,—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume, that Hullodhur

would have been content to receive, or Juggunnath would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents which describe the defendant as the adopted son of Hullodhur is some evidence that Juggunnath recognized that adoption as valid. Morever, for aught that appears in the cause, Denobundhoo may at the date of the adoption have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made, and so destroys the civil *status* of the person thus adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of *Ooman Dutt* v. *Kunhia Singh* (1). That case arose in a district governed by the Mithila law. The plaintiff claimed, under a adoption by his maternal grandfather, not in the dattaka, but in the kritrima form, which is recognized by the mithila law, to dispossess the nephew and heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different pundits and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note no doubt says: "According to the Hindoo law, while a brother's son exists, the adoption of any other individual as a son either in the dattaka or kritrima form of adoption is illegal." But the force of this note is very much weakened by the fact that Sir William MacNaghten, who, being the Editor of the Reports, was probably the author of it, afterwards, and with a full recollection of the case, wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the kritrima form, which, in its inception and consequences, is very distinguishable from one in which the natural father

(1) 3 Sel. Rep., 144.

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parts with his son in the full faith that he will be effectually and for all purposes received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the kritrima form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text-writers of eminence.

Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the plaintiff relies, says: "But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who upon spiritual considerations ought to have been preferred." And by his references to the cases collected in the second volume he shows that Mr. Colebrooke and, more strongly, Mr. Ellis were of this opinion.

Again, Sir William MacNaghten, just after referring to the case of Ooman Dutt, deals with the question thus:—"It would appear, however, that, according to the law of Bengal and elsewhere where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and in the places where the Mimansa principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held, then, that the injunction to adopt one's own sapinda (a brother's son is the first), and failing them, to adopt out of one's own *gotra*, is not essential so as to invalidate the adoption in the event of a departure from the rule." (Principles of Hindu Law, p. 68.)

It may be further observed that even Mr. Sutherland in his Synopsis (see Stokes' Codes, p. 665), says: "But though Nandita

Pandita extends this principle (*i.e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote when a near kinsman, or of a stranger when a relative may exist. The right, however, of a whole brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted, and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimansa enjoins is to be taken as imperative, and having the force of law, the language of the 74th Article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the Articles which affirm the preferential right of the brother's son.

It was urged at the Bar that the maxim *quod fieri non debuit factum valet*," though adopted by the Bengal school, is not recognized by other schools, and notably by that of Benares. That it is not recognized by those schools in the same degree as in Bengal is undoubtedly true. But that it receives no application except in Lower Bengal is a proposition which is contradicted, not only by the passage already cited from Sir William MacNaghten's work, but by decided cases. The High Court of Madras in *Chinna Gaundan* v. *Kumara Gaundan* (1), and the High Court of Bombay in the case of *Raje Vyankatrav* v. *Jayavantrav* (2), acted upon it; and that upon the question of the adoption of an only son of his natural father, on which the High Court of Calcutta, in the case of *Rajah Opendur Lall Roy* v. *Rance Bromo Moyee* (3), has refused to give effect to it, considering that particular prohibition to be imperative.

Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text-writers as Sir William MacNaghten and Sir Thomas Strange. Their treatises have long been treated as of high

(1) 1 Mad. H. C. R., 54. (2) 4 Bom. H. C. R., A. C., 191.
(3) 10 W. R., 347.

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authority by the Courts of India, and to overrule the propositions in question might disturb many titles.

Upon a careful review of the authorities, their Lordships cannot find any which would constrain them to invalidate the adoption of the defendant, even if it were more clearly proved than it is, that Hullodhur Dass could have adopted Dinobundhoo, the only son of his brother. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellants: Messrs. *Watkins* and *Latty*.

Agent for the respondent: Mr. *T. L. Wilson*.

P. C.*
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Feby. 14 & *March* 12.

SETH GOKUL DASS GOPAL DASS (PLAINTIFF) *v.* MURLI AND ZALIM, HEIRS OF TARAPAT (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner, Central Provinces].

Interest on Decrees—Indian Contract Act, s. 20 *and s.* 23, *cl.* 2, *Mistake of Fact and of Law—Error in Statement of Account.*

Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.

Where the property of a judgment-debtor had been attached in execution for a sum claimed to be due under a decree, but which sum in fact included interest not awarded by the decree,—*held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed inclusive of the interest, was not unlawful and void under cl. 2, s. 23 of the Indian Contract Act; and that the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was not a mistake of fact rendering the agreement voidable under s. 20 of that Act.

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually was. In a suit on the agreement, *held*, that such an error was ground for reforming the account, but not for setting aside the agreement.

**Present*.—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

THIS was an appeal from a decree of the Judicial Commissioner of the Central Provinces, dated the 7th September 1875, affirming a decree of the Commissioner of Jubbulpore dated the 12th March 1875, which in turn affirmed a decree of the Deputy Commissioner of Jubbulpore dated the 24th November 1874, which dismissed the suit brought by the present appellant as plaintiff.

The whole facts of the case and the questions raised for decision are fully disclosed in their Lordships' judgment.

Mr *Leith*, Q.C., and Mr *T. B. Norton* appeared for the appellant.

The respondents were not represented.

The judgment of their Lordships was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of India, in a suit instituted by the appellant against the respondents in the Court of Deputy Commissioner of Jubbulpore, for the foreclosure of a mortgage.

The following are the circumstances under which the mortgage was executed:—On the 27th June 1859, the appellant obtained a decree in the Court of the Sudder Ameen of Jubbulpore against Tarapat Patel, malguzar of Khairi, the father of the defendants, for the sum of 9,413 rupees 15 annas and 3 pie, being the balance of principal and interest due upon a bond executed by Tarapat, and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent. a month.

Between the date of the decree and the 27th June 1865, the plaintiff endeavoured, on several occasions, to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the plaintiff, or of the litigation which ensued upon them. It is sufficient to state that, in their Lordships' opinion, no laches can be imputed to the plaintiff in endeavouring to enforce the decree.

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In February 1865 the plaintiff applied to the Court of the Deputy Commissioner of Jubbulpore against the defendants and their father, Tarapat, for an attachment and sale of their rights in the village of Khairi in execution for the sum of Rs. 13,498-9-9 claimed to be due under the decree.

That sum included interest on the amount of the decree calculated up to the 14th October 1863, after giving credit for payments made on account. Upon that application, the defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th July 1865 for the attachment of their proprietary rights in the village, and for the sale thereof by public auction, after due notice according to ss. 248 and 249 of Act VIII of 1859.

On the 3rd August in the same year, orders were issued that the requisite notifications, according to s. 249, be issued, and that the sale of the right and interest of defendants in the village of Khairi should take place on the fortieth day from that date.

On the 4th the present defendants presented a petition to the Deputy Commissioner praying to be relieved from liability for the plaintiff's claim, and that the attachment might be removed from the village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

On the 18th September 1865, the mortgage upon which the suit was brought was executed. It was by conditional sale, and is in the following words:—

"Seth Khusalchand and Gokuldass of Jubbulpore, plaintiffs v. (1) Tarapat, (2) Murlidbar, (3) Zalim Singh, patels, residents, and malguzars of the Village Khairi, Pergunnah Patan, defendants.

Claim.

Execution of decree for Rs. 13,498-9-9.

"We, Tarapat, Murlidbar, and Zalim Singh, patels and residents of Mouza Khairi, defendants, are the writers of this agreement.

"The plaintiffs above named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of the Village Khairi, the 13th September 1865 was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs. 16,498-9-8.

"We have now brought the plaintiffs to terms, and having gone into the accounts, we agree to pay plaintiffs as principal, interests, costs and future interests on the decree, in all 19,000 Government sicca rupees.

"Of this we have caused 5,000 rupees to be paid by Naraindas and Raghoonath. This leaves a balance of 14,000 Government rupees, which we agree to liquidate, paying no interest, by yearly instalments as detailed below; and until the liquidation of the whole amount due, we hereby mortgage or conditionally sell the village in question, the condition being that, in the event of our failing to pay any one of the instalments agreed upon, the sale of the village shall become absolute; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalments in arrears be attributable to unfavourable seasons, &c., the said instalments will be payable next year, and will bear interest at 1 per cent.

"Should the payment in arrears be not made in the next year along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to plaintiffs remains unpaid, the village shall not be transferred by us to any one else; any such transfer, if made, shall be held to be illegal.

"We relinquish all claims to any money which the plaintiffs may have recovered at the time of the sale becoming absolute."

The details of the instalments were for the payment on the 15th Aghan, Sambat 1922, corresponding with the year 1865, of the sum of 2,000 rupees, and on Jeth 15th in each of the following twenty years, of the sum of 600 rupees, making a total of 14,000 rupees.

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On the same 18th September 1865, Tarapat, the father, each of the defendants and the plaintiff respectively, made the following statements, *viz.* :—

"Trapat, defendant, son of Mahadoo, caste Koormee, aged 50 years, malguzar, resident of Khairi, states on solemn affirmation :—

"'We have effected a settlement of his claim with the plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment.' 18th September 1865.

"Murli, defendant, son of Tarapat, caste Koormee, aged 28 years, resident of Khairi, malguzar, states on solemn affirmation :—

"'Having effected a settlement of his claim with the plaintiff by fixing instalments for its liquidation, I beg that the village be released rom attachment. We have hypothecated our village as a guarantee for the liquidation of plaintiff's claim.' 18th September 1865.

"Zalim, defendant, son of Tarapat, caste Koormee, aged 21 years. resident of Khairi, malguzar, states on solemn affirmation :—

"'We have fixed instalments for the payment of the plaintiff's claim, and beg that our village be released from attachment. We have mortgaged our village to plaintiff.' 18th September 1865.

"Seth Khusalchand, son of Sawaram, aged 62 years, caste Maheshree, resident of Jubbul, and a mahajun by profession, states on solemn affirmation :—

"'I have taken out execution of a decree against Tarapat, Murli and Zalim, and their village was about to be sold. The defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objection whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the case be struck off the file.' 18th September 1865."

The mortgage was on the same day presented by the defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy Commissioner, who thereupon, on the 19th September 1865, ordered that the kistbandi be sanctioned and the case struck off the file as completely disposed of.

The defendants continued to pay the instalments under the mortgage up to 15th Jeth 1929, but failed to pay the instalments which fell due in Sambat 1930 and 1931, whereupon the plaintiff,

on the 24th October 1874, filed his plaint and prayed for a decree for 7,800 rupees, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the defendants and their deceased father in the village in question be transferred to plaintiff, the transaction being then considered as one of an absolute sale.

The defendants in their written statement alleged, amongst other things, that in June 1859 a money-decree for Rs. 9,413-15-3 was passed against Tarapat, their father, and that future interest on the decree was not allowed; that the plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September 1865, induced Tarapat and the defendants to execute the deed sued on, by dishonestly concealing the fact that future interest had not been decreed.

They also stated that they were ignorant people, and that they executed the deed under a mistake of fact, *i.e.*, under the impression that future interest had been decreed as represented by the plaintiff; that, at the time when the deed was executed, only Rs. 3,798-4-9 was due under the decree, and that the defendants were minors at the time of the execution of the deed.

The plea of minority was found against the defendants, but the Deputy Commissioner dismissed the plaintiff's suit with costs, upon the ground that the claim was based on an illegal contract. He held that even if the plaintiff had a right to demand the sum of Rs. 13,498-9-9 for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to 16,498 rupees; and further that even if, as the plaintiff's Counsel had suggested, the plaintiff, in making up the accounts with defendants, added interest for the period from October 1863 to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for in the view of the Deputy Commissioner, it was evident that the plaintiff was well aware that he had no real claim to interest. But he went further, and held that the plaintiff was not entitled to any interest on the decree; that 4,820 rupees only were due; and that the plaintiff by concealment of facts regarding the amount due, and by

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misrepresentation of facts, as shown by the proceedings in the original case, and the application for execution for 3,000 rupees in addition to the 13,498 rupees were sufficient grounds for considering that the transactions out of which the contract grew were unlawful.

Upon appeal the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to defendant's liability to interest within the meaning of Definition 1, s. 18, of the Indian Contract Act, IX of 1872. He further held that the bond was nothing more than 'a kistbandi; that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal and void under cl. 2, s. 23, of the Indian Contract Act, and dismissed the appeal with costs.

A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was voidable under s. 20 of the Indian Contract Act, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the plaintiff. There was, no doubt, a mistake of law on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realization, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendants, but also to the Assistant Commissioner by whom the order of the 25th July 1865 was made for the attachment and sale of the village in execution for the sum of Rs. 13,468-9-9. Indeed, until the Full Bench ruling of the High Court of Bengal in September 1866 in the case of *Mosoodun Lall* v. *Bekaree Singh* (1), the principle of which was upheld by the Judicial Committee in the

(1) B. L. R., Sup. Vol., 602; S. C., 6 W. R., Mis App., 109.

case of *Pillai* v. *Pillai* (1), there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

In that uncertain state of the law, the defendants not having appeared to show cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498-9-9, which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached, and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father Tarapat was present; and it does not appear to their Lordships that, subject to what will hereafter be said as to a sum of 3,000 rupees, part of the money secured, the plaintiff gained any unconscionable advantage by the transaction; for although he was not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the Eng lish decisions bearing upon the sub ject of recovering by action interest upon a judgment which cannot be levied by execution. In the case of *Pillai* v *Pillai* (1) to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.

It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage

(1) 15 B. L. R., 383, S C, L. R., 2 Ind App., 219.

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and the times fixed for the payment of the instalments was extremely low.

It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498-9-9, but Rs. 16,498-9-8.

The recital in the mortgage is, "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs. 16,498-9-8." As to this the Judicial Commissioner says: "In the first Court's judgment the larger sum of Rs 16,498-9-8 is referred to as entered in one of the processes of execution, *viz.*, 'the notice of sale,' but the extant record of proceedings nowhere mentions such a sum. If such a sum was ever entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any wilful misrepresentation in this respect by the plaintiff, their Lordships are of opinion that them was no authority under s. 249 of Act VIII of 1859 for increasing the amount for which the village was ordered to be sold in execution from 13,498 rupees to 16, 498 rupees; that the addition has not been satisfactorily explained; and that the deed ought to be reformed by disallowing the additional sum of 3,000 rupees. This will reduce the sum secured by the mortgage by 3,000 rupees, and a proportionate part of the sum allowed for future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to 3,480 rupees. Deducting 3,480 rupees, and the eight instalments of the 14,000 rupees which have been paid, amounting to 6,200 rupees, from the total amount of 14,000 rupees secured, there remains the sum of 4,320 rupees to be paid by the defendants to the plaintiff in order to redeem the above-mentioned village

Their Lordships will, therefore, humbly advise Her Majesty that the decrees of the three lower Courts be reversed; that in the event of the defendants paying to the plaintiff the sum of 4,320 rupees, together with the costs of the plaintiff in the three lower Courts, within one year from the time of the service upon them of notice of such order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the Deputy Commissioner of Jubbulpore within that

period the said sum of 4,320 rupees, together with such costs as aforesaid for the use of the plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of 4,320 rupees, together with such costs as aforesaid, not being paid to the plaintiff by the defendants, or paid by them into the said Court for the use of the plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest of the defendants in the said village shall be transferred to and vested in the plaintiff; and in order that due notice of such order in Council shall be given to the defendants, their Lordships will further advise Her Majesty that the plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the Deputy Commissioner of Jubbulpore, in order that notice thereof may be given to the defendants in due course, and that the plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the defendants notice of the said order.

Considering the peculiar circumstances of this case, and also the fact that the plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the respondents ought not to be ordered to pay the costs of this appeal.

Agents for the appellant: Messrs. *Merriman Pike*, and *Merriman*.

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Kennedy.

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PORAN SOOKH CHUNDER AND OTHERS (DEFENDANTS) *v.* PARBUTTY DOSSEE (PLAINTIFF).*

Suit by Person in possession of Land to establish Title—Declaratory Decree —Act VIII of 1859, *s.* 15—*Practice—Grounds of Appeal taken in Argument—Specific Relief Act, I of* 1877.

The plaintiff in a suit to establish her lakheraj right to lakheraj land stated in her plaint that she was in possession of certain land by virtue of the will of her husband; that while in possession of the land, a suit was brought against her in the Small Cause Court for rent by the defendants, who obtained a decree; and that there being no appeal against the decision, the lakheraj rights in respect of the lands were consequently injured; she therefore brought the present suit.

Held, that such a suit was not maintainable, as the claim which the defendants set up was no longer in the condition of a mere assertion or a claim for right, but had passed into a decree.

Held further, that in this case the plaintiff was not without a remedy, for if a further suit for rent be brought, she might file a suit and apply for an injunction to prevent the other party from proceeding so long as her suit was not disposed of and an absolute relief given her.

Held further, that although, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, yet where a decree comes before it which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.

Semble per JACKSON, J.—That the plaintiff might, if a fresh suit for rent be brought, again raise the question of her lakheraj title, because the Small Cause Court has no power to determine finally a question of right.

THE facts of this case were as follows:—

The defendants brought a suit in the Munsif's Court against the plaintiff to recover rent on certain lands in the plaintiff's occupation, and the amount sued for being less than Rs. 50, and the land being situated within the limits of the Katwa Municipality, the Munsif tried the suit in his jurisdiction of Small

* Special Appeal, No. 647 of 1877, against the decree of Baboo Nobin Chunder Gangooly, Additional Subordinate Judge of Zilla East Burdwan, dated the 18th February 1876, reversing the decree of Baboo Promothonath Banerjee, Munsif of Katwa, dated the 28th March 1876.

Cause Court Judge, with which he was vested by Government, and gave judgment for the plaintiffs in that suit, the now defendants. The plaintiff then brought the present suit, alleging that she was entitled to the land in question under the will of her husband who had purchased it as lakheraj or rent-free land; and after setting out the proceedings in the Munsif's Court, she concluded her plaint in these words:—"There being no appeal against the said decision, no measures have been taken; consequently the lakheraj right in respect to the lakheraj land mentioned in the schedule has been injured, and therefore I have brought this suit for establishment of lakheraj right to the lakheraj land, and laid the claim at Rs. 94, the price thereof."

The defendants, amongst other things, contended that the suit would not lie, in that it indirectly sought to impeach the previous Small Cause Court decree which was final.

The Court of first instance overruled this objection, but upon the merits he found against the plaintiff and dismissed the suit. On appeal by the plaintiff this judgment was reversed, and the present appeal was thereupon preferred by the defendant.

Baboo *Mohini Mohun Roy* for the appellants—This suit cannot be maintained. It seeks a declaratory order in respect of the title to land in the possession of the plaintiff. It is also an illegal attempt to set aside a decree of the Small Cause Court which is final, and cannot therefore be impeached. [JACKSON, J.—You do not take this objection in your grounds of special appeal.] That is so, but this is an objection which, if valid, goes to the jurisdiction of the Court which entertained the suit. This Court is therefore bound to give it effect.

Baboo *Sreenath Doss* with him Baboo *Hemchunder Banerjee* for the respondent.

The following judgments were delivered by

JACKSON, J.—It appears to us that the objection taken during the argument of this special, appeal although it was not taken in the memorandum of appeal, is a valid objection to the decision. The facts of this case are shortly these: (The learned Judge

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stated the facts of the case as set out above, and having remarked that the particular question before the Court might not have been discussed by the defendants in the Court of first instance continued).—The defendants appeal specially to this Court, and of course we are not only entitled, but bound to consider an objection which raises the question whether the plaintiff was entitled to maintain the suit and to obtain the decree which she asked for. It has been constantly ruled in this Court and in the other High Courts, and the law is stated in the case noticed by Mr. Broughton in his edition of Act VIII of 1859—*Padagalingam Pillay* v. *Shanmugham Pillay* (1).—that a suit ought not to be maintained where "the plaintiff who merely seeks for a declaration of title is in possession." In the present case the plaintiff was and is in possession of the land to which she says she is entitled. But she says, "inasmuch as the defendants claim to be entitled to take rent from me in respect of these lands, and inasmuch as I claim to hold the land lakheraj, free from payment of any rent, by that claim of the defendants, and by the fact that under such a claim they recovered a decree against me in the Small Cause Court, a cloud has been thrown on my title." And she alleges that, as a justification for this suit. There are no doubt cases—I am speaking now of the state of the law before the Specific Relief Act was passed—in which a plaintiff has been allowed to say: "The defendant sets up a title, a mortgage or any other title, embodied in a certain document. I have accordingly brought the document into Court, and I call upon the Court to look into that document, the alleged mortgage, or whatever it might be, and to determine whether that is a valid mortgage." And if the Court held that the mortgage was not valid, then the mere invalidation of the document relied upon by the defendant has been considered such relief as the plaintiff might properly ask for (2).

1 2 Mad. H. C. R., 333.

(2) See *Fakir Chanda Thakur Singh*, 7 B L. R, 614; *Prasanna Kumar Sandyal v. Mathurnath Banerjee*, 8 B. L. R., App., 26. The words in s. 15 of Act VIII of 1859 are to be inter- preted as giving a right to obtain a declaration of title only in those cases in which the Court could have granted relief, if relief had been prayed for—*Nilmony Singh Deo* v. *Kalee Churn*

In the present instance the claim which the defendants have set up is no longer in the condition of a mere assertion or a claim for right; it has passed into a decree. Consequently the plaintiff could not bring this suit for the purpose of setting aside the judgment of the Small Cause Court, and therefore no relief could be had in respect of that. It appears to me, therefore, that under the law as it stood before the Specific Relief Act was passed, the plaintiff could not maintain the present suit. It was suggested that in such circumstances, unless such a suit as the present is allowed to be maintained, the plaintiff will be without a remedy. That, in the first place, is not a reason for allowing a suit to be maintained which the law does not allow. But in the next place, it does not seem that the plaintiff is without a remedy, for it is quite conceivable that if a further suit for rent be brought, she might immediately file a suit in the Munsif's Court and apply for an injunction to prevent the other party from proceeding so long as her own suit is not disposed of and an absolute relief given her It may also be, although I do not wish to express any positive opinion on the point, that the plaintiff before us may, if a fresh suit for rent be brought, again raise the same question, because the Small Cause Court has no power to determine finally a question of right. But it is unnecessary to decide that point. All that I say is that the present suit is not maintainable. I have the satisfaction of seeing that in addition to this ground there were other good grounds of defence which the defendants had in the present suit and which the Munsif found in their favour, so that if possibly the suit might come before us for trial on the merits, we might be inclined to reverse the judgment of the lower Appellate Court also on other grounds In both these appeals, therefore, the decrees of the lower Appellate Court will be reversed and the decrees of the Court of first instance dismissing the suit will be restored with costs.

KENNEDY, J.—I entirely concur. As a rule, this Court will not permit grounds of appeal to be taken in argument which

Bhuttacharjee, 14 B. L. R, 382; see also *Strimathoo Natchiar* v. *Doraisinga Tevar*, 15 B. L. R, 83. The power of the Court to pass declaratory decrees is now to be found in s. 42 of the Specific Relief Act (I of 1877).

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have not been taken in the memorandum; but where a decree comes before it which upon its very face is illegal,—a decree which goes beyond the power of the Court which passed it under circumstances of this sort,—I take it that this Court is bound to take up the point itself and rectify the mistake, and not allow itself to become an instrument to the commission of further mistakes.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Morris.

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KOONJ BEHARY CHOWDHRY AND OTHERS (OBJECTORS) *v.* GOCOOL CHUNDER CHOWDHRY AND ANOTHER (PETITIONERS).*

Certificate to collect debts—Questions of validity of alleged adoption—Title —Act XXVII of 1860.

The Court will refuse to grant an application for a certificate to collect the debts of an intestate who has been dead forty years at the time of making the application, the presumption being that, owing to the operation of the law of limitation, there could be now no debts due to him which could be recovered.

A question of title cannot be judicially determined between parties in an application under Act XXVII of 1860. Therefore, where the object of such an application was to obtain a judicial determination as to the validity of an alleged adoption.—*Held* that such a question could only be decided in a Civil Court.

THE appellants in this case, representing themselves as the *gyantees* (cognates) of one Gournath Chowdhry, deceased, applied, on the 26th of February 1875, for a certificate under Act XXVII of 1860, empowering them to collect the debts due to the estate of the intestate. At the time of making this application Gournath Chowdhry had been dead forty years. On the 30th March 1875 a cross-application for a similar certificate was made by Tripura Sundari and Kheema Sundari, being the widows of one Gobind Chunder Chowdhry, the alleged adopted son of the widow of the intestate. The two widows, on the 3rd May 1875, also presented a formal petition of objection to the

* Miscellaneous Regular Appeals, Nos. 36 and 37 of 1877, against the order of J. B. Worgan, Esq., Judge of Zilla Rajshahye, dated the 30th June 1876.

application made by the appellants. The District Judge, after a protracted hearing, refused to grant the appellants' application on the ground that a *primâ facie* case had been made out to show that Gobind Chunder Chowdhry had been adopted by Kalee Sundari Chowdrain, the widow of the intestate.

In the application made by the two widows, Tripura Sundari and Kheema Sundari, the Court made an order granting them certificates under Act XXVII of 1860. The *gyantee* applicants appealed both cases to the High Court.

Baboo *Grija Sunker Mookerjee* for the appellants.—The lower Court should have finally determined the question of adoption raised on this case and not rested content with finding that only a *primâ facie* case had been made out; see *Mussamut Anundee Kooer* v *Bachoo Singh* (1).

Baboo *Sasibhooson Dutt* for the respondents.—The appellants' application was really meant to raise the question of the validity of the adoption, and this could not be entered, into in the present matter.

The judgment of the Court was delivered by

KEMP, J.—This is an application, not as the Judge states for a certificate to collect debts due to the estate of Kalee Sundari Chowdrain, who had no interest beyond a life-interest, but it is an application for a certificate under Act XXVII of 1860, to collect debts due to the estate of the late Gournath Chowdhry. Now it is admitted that Gournath Chowdhry died in Aughran 1245, or some forty years ago. The application for a certificate on the part of the appellants before us is on the footing that they are the *gyantees* of Gournath Chowdhry, and there was a counter-application by two ladies, Tripura Sundari and Kheema Sundari, who allege that they are the widows of Gobind Chunder Chowdhry, the adopted son of Gournath Chowdhry, and that they represent the interest of his two minor sons as their guardians The Judge has examined a large

(1) 20 W. R., 476.

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number of witnesses in this case. Their examination appears to have lasted over twelve days; it was then postponed for a considerable period and resumed again. The examination of the witnesses extends over no less than 114 pages of foolscap paper. Upwards of a 100 exhibits were filed, and the Judge, after entering into considerable argument as to whether certain sections of the Evidence Act applied, as regards the admissibility or otherwise of certain documents, has come to the conclusion that a *primâ facie* case has been made out in this case as to the alleged adoption of Gobind Chunder Chowdhry under an onoomutee puttro granted by Gournath Chowdhry to his widow, the late Kalee Sundari Chowdrain. The application for a certificate on the part of the *gyantees* was therefore rejected.

We think that this application might have been rejected on a very simple ground and without entering into this protracted investigation. It is an application made for the purpose of representing the estate and collecting the debts of Gournath Chowdhry, who died more than forty years prior to this application, and therefore on this ground alone we think that this application should not have been entertained.

In a case of this description under Act XXVII of 1860, although under the ruling in *Mussamut Anunda Kooer* v. *Bachoo Singh* (1), referred to by the pleader for the appellant in the course of the argument, the Judge was bound to inquire which title was made out *for the purposes of the legal requirements of the Act* those learned Judges also observe that no title can be judicially determined between the parties as the result of the inquiry made under Act XXVII of 1860. Now it appears to us clear that the object of the application in this case was to obtain a judicial determination of the question whether Gobind Chunder Chowdhry was the adopted son of the late Gournath Chowdhry or not, a question which can only be decided in a civil suit.

We therefore dismiss this appeal.

Appeal dismissed.

(1) 20 W. R., 476.

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1873) to Augran 1281 (November 1874); and at Rs. 2 per mensem from Pous 1281 (December 1874) to Choitro 1282 (March 1875); and on default in payment of three successive instalments the whole should be due. The defendants had not paid for any instalment, hence that portion which has been barred was relinquished, and the present suit is to recover the sum due for instalments from Pous 1281 (December 1874) to Cheyt 1282 (March 1875), being Rs. 35, and it was instituted on the 13th December 1877.

The defendants contend that, 'under' the contract as alleged by the plaintiff, the whole sum became due on the default in payment of three successive instalments from Pous to Falgoon 1280 (December 1873 to February 1874), and the plaintiff's cause of action to recover the whole sum accrued in Cheyt 1280 (March 1874); and as this suit has been brought after the expiration of three years from the said date, so the claim is barred, as the provision of art. 75, second schedule, in Act XV of 1877, is not applicable to suit for money due under oral contract.

The plaintiff, in reply, contended that the said rule is general and equally applicable to oral contract.

Both parties applied to refer the case, under s. 617 of the Civil Procedure Code, Act X of 1877, for the decision of the following point by the Honorable High Court:—

The point referred for decision was, whether the provision of art. 75, second schedule, Act XV of 1877, is applicable to oral contracts or to written instruments only?

Baboo *Gopal Chunder Sirkar* for the plaintiff.

Baboo *Sreenath Banerjee* for the defendants.

JACKSON, J. (CUNNINGHAM, J., concurring).—Answering simply the question put to us, we think we are bound to say that art. 75 of the Indian Limitation Act of 1877 does not apply, according to its strict terms, to a suit brought upon a verbal contract. But it appears to us that the question does not really arise in the present suit, because we think the plaintiff was not bound, but only had the option, to avail himself

of the clause enabling him to sue at once for the whole amount due on the failure to pay the particular instalments, and in point of fact, the money did not otherwise become due except on the falling due or arrival of the date of the successive instalments.

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KOYLASH CHUNDER DASS *v.* BOYKOONTO NATH CHUNDRA.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF BHOOBUNESHWAR DUTT, PETITIONER.*

1877 *Dec.* 14.

Refusal to give Receipt for Summons—Indian Penal Code (Act XLV of 1860), s. 173.

A refusal to give a receipt for a summons is not an offence under s. 173 of the Indian Penal Code.

Reg. v. *Kalya bin Fakir* (1) followed.

IN this case the prisoner was charged with refusing to give a receipt for a summons. The prisoner appealed, on the ground that the conviction was not warranted by law, inasmuch as refusing to acknowledge the receipt of a summons, either personally or by another person, does not constitute the offence under s. 173 of the Indian Penal code.

Baboo *Amarendra Nath Chatterjee* for the petitioner.

MARKBY, J.—It appears to us that this conviction must be set aside. The charge against the petitioner was, that he had refused to give a receipt for a summons. This has been held by the High Court of Bombay in *Reg.* v. *Kalya bin Fakir* (1) not to be an offence under s. 173 of the Indian Penal Code, which is the section under which this conviction has been made. We concur in that decision.

This conviction will, therefore, be set aside; and the fine, if paid, will be refunded. If the petitioner is in jail, he will be released.

* Criminal Motion, No. 232 of 1877, against the conviction and sentence of H. A. D. Phillips, Esq., Officiating Joint-Magistrate of Sub-Division Sewan, Zilla Sarun, dated 18th September 1877.

(1) 5 Bom. H. C. Rep., Cr. Cases, 34.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
April 16

THE EMPRESS *v.* GANGADHUR BHUNJO AND OTHERS.*

Stamp Act (XVIII of 1869, *ss* 29, 43—*Procedure—Magistrate authorized to prosecute.*

A Magistrate who has been authorized by the Collector of a district, under s. 43 of the Stamp Act, to prosecute offenders against the stamp laws, is not competent also to try persons whom he prosecutes The Collector should appoint some person other than a Magistrate to conduct the prosecutions.

THE petitioners were convicted by the Assistant Magistrate of Contai, under s. 29 of Act XVIII of 1869, for evasion of the stamp law, and were fined Rs. 18.

PRINSEP, J.—These cases have been submitted to us by the Sessions Judge of Midnapore, because sentences of fine have been imposed by the Magistrate of the Division of Contai for breaches of the stamp law contrary to the rule laid down in the case of the *Queen* v *Nadi Chand Poddar* (1).

It appears that the Collector authorized this officer, under s. 43 of the Stamp Act, to institute and conduct the prosecution in these cases. Under these circumstances we think that he was not competent also to try them. Any possible inconvenience might have been obviated by the Collector's employing the Government pleader or some other person to conduct the prosecution under s. 43. We quash the convictions and sentences, and direct that the fines, if paid, be refunded.

* Criminal Reference, No 43 of 1878, from an order of W Cornell, Esq., Officiating Sessions Judge of Midnapore, dated the 8th April 1878.

(1) 24 W R, Cr. Rul., 1.

Before Mr. Justice Markby and Mr. Justice Prinsep.

IN RE THE EMPRESS *v.* SAHAE RAE.*

1878
April 18.

Criminal Procedure Code (Act X of 1872), *s.* 263—*Verdict—Disagreement in finding of Jurors—Dissent of Judge from Verdict of Majority—High Court, Power of.*

An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head, causing death. *Held*, that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.

Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X of 1872, the High Court is competent to find the prisoner guilty notwithstanding an acquittal by the majority of the jury.

It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed.

THIS was a reference to the High Court under s. 263 of the Criminal Procedure Code. The prisoner had assaulted a woman, who, at the time of the assault, had a child in her arms, and one of the blows which the prisoner was aiming at the woman fell on the child's head and caused its death.

The prisoner was thereupon charged with (i) culpable homicide not amounting to murder; (ii) of causing death by a rash and negligent act; (iii) grievous hurt; (iv) hurt. No charge was made with reference to the assault upon the mother.

The jury unanimously found that the prisoner had been guilty of an assault upon the woman Chetya; but made no mention of the infant. On being told to reconsider their verdict, three of them announced that they did not believe the child had been killed by the prisoner; but the remaining two were of opinion that the prisoner was guilty of culpable homicide not amounting to murder, of the child.

* Criminal Reference, No. 318 of 1878, from an order of J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated the 29th March 1878.

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On account of this finding of the jury, the Officiating Sessions Judge of Patna, differing from the verdict of the majority, sent up the case, on the 29th March 1878, to the High Court.

Baboo *Juggodanund Mookerjee* for the prosecution.

Mr. *Twidale* for the prisoner.

The judgment of the Court was delivered by

MARKBY, J.—The facts of this case do not appear to be susceptible of any doubt. The prisoner was employer of a man, named Behary, his wife Chetya, and his sister Foolcoomaree. Some disagreement appears to have arisen as to the payment of the wages due to this family. In the morning in question the prisoner went to the house of Behary, and called Chetya, the wife of Behary, and Foolcoomaree his sister, to execute some work on his behalf. They refused and made use of language which, no doubt, was disrespectful. Therefore, the prisoner, with the shoes which he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months old in her arms, the head of the child, as she describes it, being either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was almost certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of hurt to the child; the last two charges being added by the Sessions Judge. There was no charge made with reference to the assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether; the other two jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority, who have acquitted the prisoner altogether; but we eel somewhat embarrassed in the matter by this, that he has not told us of what crime in his opinion the prisoner was guilty. Reading ss. 263 and 464 of the Criminal Procedure Code together, we think that it is the duty of the Judge in cases like

this to give us his own opinion, if he disagrees with the verdict of acquittal, as to the exact offence of which he considers the prisoner is guilty. We think that this Court has a right to expect from the Sessions Judge his opinion in a case of this kind. Nevertheless, we think we are still competent to deal with the matter, and the Government pleader, who has appeared before us, has very properly not pressed for a conviction of culpable homicide. We are extremely doubtful whether technically the charge of culpable homicide could be supported. But we think we are justified upon the facts proved in finding the prisoner guilty of grievous hurt under s. 322. There being no doubt whatever as to the facts of the case, we have no hesitation in finding the prisoner guilty under that section, notwithstanding that he was acquitted altogether by three of the jury, probably because they did not fully understand the law upon the subject No doubt, what the prisoner intended was to inflict some injury upon the mother; and in one sense, he did not intend to inflict any injury upon the child at all; but it seems to me, that the language of s. 321 covers a case in which a man intending to aim a blow at one person strikes another. That section says :—"Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said voluntarily to cause hurt to such person." The very general language of that section was, I think, used expressly for the purpose of covering a case of this kind. I also think that the prisoner is also liable for causing grievous hurt. Section 322 provides that "whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt." I think, that it is impossible to say, when a man strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, that he does not know that he is likely to cause grievous hurt to the child. He must, as a reasonable being, know that nothing is more probable than that the blow which he aims at the woman would fall on the child, and that any blow which would fall

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upon the child's head would be likely to cause such hurt as would endanger the child's life. This is one of the definitions of grievous hurt, and, therefore, in my opinion the prisoner ought to be convicted under s. 322.

Of course, the most important matter in this case is, what is the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was very violent. There was nothing which could justify his conduct even as regards the mother; and to strike a woman with a child of tender age in her arms is certainly a most unjustifiable act. No doubt, the prisoner never intended to do any injury to the child, but still he has done an act which deserves severe punishment. Under s. 322 of the Indian Penal Code he will be sentenced to rigorous imprisonment for two years.

PRIVY COUNCIL.

P. C.*
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June 20, 21, 22; *July* 19.

MAHARAJAH PERTAB NARAIN SINGH (PLAINTIFF) *v.* MAHARANEE SUBHAO KOOER AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Commissioner of Fyzabad, Oudh.]

Act I of 1869, *s* 22, *cl.* 4—*Talookdar—Treatment of Son of Daughter as a Son—Revocation of Hindu Will.*

Where an Oudh talookdar, not having male issue, is shown to have so exceptionally treated the son of a daughter, as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of s. 22, Act I of 1869.

Circumstances affording evidence of such an intention considered.

The will of a Hindu may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

THIS was an appeal from a decree of the Commissioner of Fyzabad in Oudh, dated the 24th December 1873, confirm-

* *Present.*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER

ing a decree of the Deputy Commissioner of that district, dated the 28th July of the same year.

The suit in which the appeal arises was instituted on the 21st November 1872 on behalf of the present appellant by his mother Brij Raj Kooer. The plaintiff's claim was for a declaration of his title to succeed to the whole of the estate of the late Maharajah Man Singh, his maternal grandfather, who was a Hindu.

The facts of the case and the issues raised between the parties are set forth in their Lordships' judgment.

The Courts below differed as to whether the treatment of the appellant by the Maharajah was such as was contemplated by Act I of 1869, s. 22, cl. 4, the Deputy Commissioner deciding that it was, and the Commissioner that it was not; but they were agreed in holding that the Maharajah's will was valid and had not been revoked by him at the time of his death.

Mr. *Leith*, Q.C., and Mr. *Joseph Graham*, for the appellant, contended that the object of the Maharajah in executing the instrument of the 22nd April 1864 was merely temporary, and that, assuming the view of the lower Courts that it constituted a valid devise, it was liable to revocation, and had in fact been revoked and superseded by subsequent declarations and acts on his part, and finally by his express direction. The circumstance of its not having been destroyed in accordance with these directions was immaterial, and it was not necessary that these instructions should be in writing. Any declaration from which an intention to revoke could be collected was sufficient. *Ex-parte The Earl of Ilchester* (1); *Walcott* v. *Ochterlony* (2); *Doe d Reed* v. *Harris* (3); and see the cases collected in 1 William Saunders, pp. 278*b*. and 279*b*. On the evidence the Deputy Commissioner was right in holding that the appellant came within the provisions of cl. 4, s. 22 of Act I of 1869.

Mr. *Cowie*, Q.C., and Mr. *Doyne* (Mr. *Thomas* with them) for the respondents.—If, as had been found by both Courts

(1) Vesey, 348, at p. 370. (2) 1 Curteis, 580.
(3) 8 Ad. and El., 1.

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below, the Maharajah died testate, cl. 4, s. 22, Act I of 1869, does not apply, since that only relates to cases of intestacy. Assuming the question of evidence to be open, there was no evidence of subsequent conduct or acts on the part of Man Singh from which it could be collected that he revoked or altered the will of the 22nd April 1864. The lower Courts were warranted in rejecting the evidence that verbal instructions were given by Man Singh for the destruction of that will, and the mere expression on his part of a wish that the power of appointment therein given might be limited to the appointment of the appellant would not amount to a revocation. Where a written will is alleged to be revoked by parol, the evidence ought to be strict and stringent; *Lemann* v. *Bonsall* (1). Here there were no facts on which an inference of an intention to revoke could be made in face of the finding of the lower Courts that there was no direction to destroy. If, however, Man Singh died intestate, the Commissioner was right in holding that no such exceptional treatment of the appellant had been proved, as would entitle him to set aside the rights of the Maharanee as her husband's widow under the ordinary Hindu law.

Mr. *Leith* replied.

Cur. adv. vult.

Their Lordships' judgment was delivered by

SIR J. W. COLVILE.—The question raised by this appeal is the right of succession to the taluq of the late Maharajah Sir Man Singh, one of the most considerable, if not the most considerable, of the great landholders of Oudh, whose status and rights are the subject of Act I of 1869.

The Maharajah died on the 11th October 1870. He had no male issue. His nearest surviving relatives were his widow, the Maharanee Subhao Kooer, a daughter by a deceased wife, and the appellant, the son of that daughter. The Maharajah had also brothers, and brothers' sons, of whom some survived him. His grandson, the appellant, was known in the family

(1) 1 Addams, 389.

as "Dadwa Sahib," by which name he will be generally designated in this judgment.

The property which is the subject of this litigation belonged to Man Singh before the annexation of Oudh. He was one of the first who made their peace with Government on the restoration of the British power in 1858, and his title as taluqdar was duly confirmed by sanad. The estate is said to have been originally one which, according to the custom of the family, was descendible to a single heir, not necessarily determined by the strict rule of primogeniture. It had certainly passed from Buktowar Singh, the preceding proprietor, to his nephew, Man Singh, though the youngest of three brothers. Accordingly, when the lists prescribed by s. 1 of Act I of 1869 were made up, the name of Man Singh, as taluqdar, was inserted in the first and second of those lists.

Some years before the passing of this Act, and on the 22nd April 1864, Man Singh, under the circumstances which will be afterwards considered, executed and delivered to the Commissioner of the district a document, of which the following is a translation:

"I, Maharaja Man Singh, &c., taluqdar of Shahgunge, Gonda, &c., do hereby declare that, as I have not yet come to any determination as to what boy is to become my successor, I, for the present, declare my wife to become my successor, and inherit the whole of my property, whether moveable or immoveable. She will, until she nominates a successor, have the same power over the property as myself, except that she will not be authorized to make a transfer. There is no partner of mine in my moveable or immoveable property. I have, therefore, executed this will, and deposited it in a public office that it may serve as a document, and prove of use when required."

Mr. Simson, the then Commissioner, made the following indorsement on the will:—"April 22, 1864. Maharaja Man Singh this day in person signed this document in my presence, and then delivered it to me as his last will and testament." And wrote on the envelope within which it was inclosed—"Within this sealed envelope is Maharaja Man Singh's will. I forward

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the envelope to the Deputy Commissioner of Fyzabad, with instructions to lodge it, sealed as it is, in the Treasury; and each treasury officer will note it in his receipt on giving or receiving charge. Of course the Maharaja may reclaim this on a written application properly authenticated at any time."

After the death of the Maharaja, and in November 1870, this will was opened, and under it the Maharanee was put into possession of the taluq. She afterwards, by a document dated August 16, 1872, exercised the power which the will gave her of "nominating a successor" in favour of the respondent, Triloki Nath, who was a son, then under age, of one of the late Maharaja's brothers, and had married her own neice.

Shortly after this transaction, the appellant, Dadwa Sahib, instituted this suit, praying for a declaration of his title to the succession to the Maharaja's estate, and for the cancellation of the document of April 22, 1864 (the will); that of August 16, 1872 (the appointment); and the order of the revenue authorities of November 11, 1870, whereby the Maharanee was put in possession.

It is now admitted on all sides, if it were ever seriously disputed, that the appellant can only succeed in his suit by establishing both the following propositions:—

1. That the testamentary disposition which the Maharajah unquestionably had power to make, and did make in April 1864, was revoked or became inoperative in his lifetime.

2. That the appellant is entitled to succeed to the taluq as the son of a daughter of the Maharajah, who had "been treated by him in all respects as his own son" within the meaning of the 4th clause of s 22 of Act I of 1869; it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the taluq under the special canon of succession to intestate taluqdars established by that section of the Statute.

The Court of first instance and the Appellate Court in Oudh have concurred in determining the first of these issues against the appellant. The second of them was found in his favour by the Court of first instance; but that decision was reversed by the Appellate Court.

In dealing with this appeal, their Lordships propose to consider, in the first instance, whether the appellant has established that he was treated by the late Maharajah "in all respects as his own son" within the meaning of the enactment in question, and is consequently the person entitled to inherit the taluq if the Maharajah died intestate.

The clause is perhaps not very clearly or happily expressed, and considerable doubt appears to prevail in Oudh as to the construction to be put upon it. One passage in the Commissioner's (Mr. Capper's) judgment almost implies that, inasmuch as the actual treatment of a son by his father varies in all countries according to the characters of the parent and the child, it is impossible to say what the Legislature meant by the treatment of a grandson "in all respects as a son." Other passages of the same judgment seem to assume that the treatment must in some way be tantamount to an adoption under the Hindu law, involving the legal consequences of such an adoption as, *e.g.*, the subjection of the grandson to prohibitions as to marriage which would not otherwise attach to him. And the appellant's own plaint affords some colour to such a construction, by describing his mother and guardian as his "sister."

Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu law. They apprehend that a Hindu grandfather could not, in the ordinary and proper sense of the term, adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly obsolete) of constituting in the person of a daughter's son a "patricá-puttra," or son of an *appointed* daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but is not, therefore, essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd section, applies to all the taluqdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindus, Mahomedans, or of any other religion; and it is not until all the heirs defined by the ten first claus es are

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exhausted, that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe.

It is necessary then to put a general as well as a rational construction upon the provision advisedly introduced by the Legislature into this statutory law of succession. And taking the whole section together, their Lordships are of opinion that wherever it it shown by sufficient evidence that a taluqdar not having male issue has so exceptionally treated the son of a daughter as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment in question.

Their Lordships will now proceed to consider the effect of the evidence as to the treatment of the appellant by the Maharajah.

It is unquestionable that the appellant was from the first brought up in the house of his grandfather, and not in that of his father. This circumstance, of itself, does not go far to prove his case. It may be accounted for by the fact that the social position of the father, though respectable, was very inferior to that of the Maharajah. But, whatever may be its value as evidence, this is a circumstance in the treatment of the boy which involved a departure from the ordinary usages of Hindus. On the other hand, it must be admitted on the evidence that the Maharajah had not, in 1864, formed a clear intention that Dadwa Sahib, who was then between seven and eight years old, should be his successor.

It has been said that the making of his will was the result of pressure on the part of the authorities. However that may be, the act was a natural one. At that time nothing was definitively fixed as to the course of succession to the newly constituted taluqs, except that the taluqdars had an absolute power of disposition over them. The family custom which had previously regulated the succession to the Maharajah's taluq was one which implied selection. It was, therefore, in every way desirable that the Maharajah should make

some provision as to his successor. The will, which was clearly his own act, indicates that he intended his successor to be a male, though he had not yet made up his mind as to the person. His words are: "As I have not yet come to a determination as to what *boy* is to become my successor." He, therefore, made his wife provisionally his heir, delegating to her the power of selection, which, in his then state of mind, he did not feel able to exercise himself.

That state of mind is the more conceivable if we suppose that he had then begun to entertain the notion that Dadwa Sahib should ultimately succeed him. Had he then resolved that the successor should be taken from his male relations *ex parte paternâ*, it would have been comparatively easy to nominate a brother or brother's son. In that case his only reason for delaying his choice would have been the desire to be more fully assured of the fitness of the person selected. But a predilection for his grandson would introduce fresh and more serious grounds for hesitation and delay. Independently of his affection for the boy, he might feel that the estate, being separate property, would, according to the *Shasters*, devolve upon him in preference to collaterals, though in the male line. On the other hand, he may have felt reluctant to depart from the family custom and offend his relations by allowing the estate to pass out of his own "gotra." And if, as is stated on the record, he were a man apt to prefer an indirect to a direct course, he might well determine to shift the responsiblity of selection to his widow, to whom he might confide his real and final intentions, trusting to her for the performance of them. That the above was really the state of mind and feeling of the Maharajah when he made his will appears in some measure from the evidence of Anunt Ram, his dewan, whom the Deputy Commissioner considered to be a trustworthy witness.

In 1867 the ceremony of the *Janeo*, or investiture of the appellant with the Brahminical thread, took place. That this was done with considerable pomp in the Maharajah's house; that the Maharajah took that part in the ceremony which, in the ordinary course of things, would be assumed by the

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boy's natural father, seems to be established. That what was done operated either in law or in fact as a transfer of the boy from his own into the Maharajah's *gotra* their Lordships, upon the conflicting evidence in the cause, and against the opinion of Mr. Capper, are unable to affirm.

The next important event in Dadwa Sahib's history was his marriage in 1868 to the daughter of Darogha Ramdhan. It seems to be clearly established that on that occasion the Maharajah wrote the two following letters to the father of the bride. The first is in these words:—

"Lallah Tulsiram came to me and verbally mentioned to me all the facts. I have in my former letter already stated what I wished to communicate to you, and you should attach great weight to that statement. I had fully weighed all the ups and downs before I embarked in this affair. In short, when I have candidly declared Dadwa to be my heir, and am about to celebrate his marriage, with a view that he may stop here, you can have no cause to entertain any apprehension.

"The will contains no such derogatory clause as you have heard. Every sentence in it has a peculiar meaning. Moreover, I have made my intentions known to Colonel Barrow, which you should consider quite correct; you should be quite satisfied."

The other letter is as follows:—

"I have received your letter and become acquainted with its contents. You have some doubt regarding the marriage of Dadwa, but you know very well that I have declared no one to be my heir except Dadwa, and this is known to the authorities. This is the reason that my brothers are displeased with me. You are entirely in fault. As I have made him my heir, and am about to celebrate his marriage here, how is it possible that any other person can become my successor? Dadwa has no reason to go to his native place. You should rest satisfied, and consider what I write to you to be of great weight. I have fully made my views known to my wife. So you should be satisfied, and make preparations for the marriage."

These letters, no doubt, are no legal revocation of the will. They seem rather to recognize the continued existence of a will.

But they are pregnant evidence to show that the Maharajah's inclinations in favour of his grandson had then ripened into a confirmed intention to make him his successor. They are consistent with the hypothesis that the Maharajah at that time either thought that he had named Dadwa Sahib in the will as his successor, or had instructed his wife to exercise her power of appointment in Dadwa's favour. They are inconsistent with the hypothesis that at that time he was in doubt as to the person who should succeed him; or intended to leave to the Maharanee a discretionary power to name any other successor.

There remains, no doubt, the possibility that these letters, written to remove the apprehensions of his correspondent, and in order to bring about the proposed marriage, were written with a dishonest intention to deceive. But nobody has sought to cast upon the Maharajah's character the imputation which such a supposition implies.

These letters hardly require the confirmation supposed to be afforded by what has been called the "red letter," being the invitation to attend the marriage, which was addressed by the Maharajah to the late Nowring Singh, and contains the words:—"Do not regard this as a customary invitation. Dadwa Sahib is the light of my eyes, and heir to my property." Their Lordships, however, think it right to state that they see no reasons to doubt the genuineness of that document. The original is produced by the widow of the person to whom it was addressed, and it corresponds with a copy of it in the Maharajah's letter-book.

The documentary evidence which has just been considered is far more important as direct evidence of this intention of the Maharajah than any parol testimony touching the manner in which the marriage ceremony was conducted. It also goes far to corroborate the testimony of the plaintiff's witnesses on this point, when that is in conflict with the testimony adduced by the defendants.

There is, again, some conflict of evidence as to the fact whether the appellant bore the title of Kowar. There is, however, some evidence that the title was often conceded to him, though he is

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not uniformly so designated in the Maharajah's own letters. He is so designated in the "red letter." There is also evidence, which their Lordships see no reason to doubt, as to his having on important occasions sat on the guddee with the Maharajah; of his having been introduced by the Maharajah's desire to European officers high in authority; of his having been taken to the Durbar of the Governor-General and put prominently forward there; and it cannot be doubted that the effect of the Maharajah's treatment of him was to produce a strong impression on the minds of the officials that he was the intended successor.

So matters stood when the Maharajah, as one of the leading members of the British Indian Association of Taluqdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.

Imtiaz Ali, the vakil concerned in the drafting and preparation of this Act on the part of the taluqdars, has sworn that cl. 4 of the 22nd section originated with the Maharajah; that it was opposed by some of the taluqdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the Bill, and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib.

There is some contradictory evidence on this point on the part of the defendants. One of their witnesses, however, Chowdree Niamut Khan, seems to admit that the Maharajah was the author of the clause in question, though he represents that it was inserted for the benefit of Mahomedan rather than for that of Hindu taluqdars. He says, "I asked Maharajah Man Singh what the object was of the clause in question, and he informed me that, in the absence of a near relation, grandsons on the daughter's side can have no claim under the Hindu law, but under the Mahomedan law they have; and that the clause in question was inserted with the view that the followers of neither religion might suffer, and that the provisions of the Hindu law might not be contravened" It is not easy to see why the Maharajah should have been thus anxious to originate

a clause that was to enure only for the benefit of Mussulman taluqdars.

The scale, however, is conclusively turned in favour of the testimony of Imtiaz Ali on this point by the evidence of Mr. Carnegy.

Mr. Carnegy, whatever may be the effect of his evidence upon the questions of revocation, which will be hereafter considered, cannot, their Lordships think, be disbelieved as to the fact that a conversation did take place between him and the Maharajah in January 1870, and that in the course of that conversation the Maharajah did make a statement to the effect that he had had a clause inserted in Act I of 1869 to suit the identical case of the Dadwa. That statement is very material, inasmuch as it shows that the Maharájah considered that he had treated his grandson in all respects as a son.

The Deputy Commissioner (Mr. King), speaking possibly in some measure from personal knowledge, says:—"It is not saying too much, the Court believes, to say that if the plaintiff had not existed, the clause as it stands would never have been enacted." Their Lordships, weighing the evidence in the cause, and proceeding on that alone, would come to the same conclusion.

It appears, then, to their Lordships that, however uncertain it may be when the notion of making the Dadwa Sahib his successor was first conceived, or when that notion first became a fixed intention, it is established that the Maharajah had that intention as early as the date of the Dadwa Sahib's marriage; that, with that intention, he continually treated his grandson in fact as the son of the house would be treated, and not as a mere grandson by a daughter; and that, in order to effectuate his intention by operation of law, rather than by will, he caused the clause in question to be inserted in the Statute.

They are further satisfied that the treatment in point of fact was such as the words of the clause upon the true construction of it must be held to contemplate; and that, in the events that have happened, the appellant was the statutory heir to the taluq if the Maharajah is to be held to have died intestate.

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They now approach the more difficult question, whether there was a revocation of the will.

If the finding of their Lordships upon the question of "treatment" is correct, it follows that the Maharajah, from the time of his return from Calcutta, would presumably have, with regard to his will, the *animus revocandi.* It is unreasonable to suppose that, having been at so much pains to make Dadwa Sahib his heir *ab intestato,* he would wish to leave that arrangement liable to be defeated at the will, and by the act, of the Maharanee. Moreover, his conduct, and what we are told of his character, make it probable that, even if he thought the succession of Dadwa was secured either by the terms of the will or by further instructions given to the Maharanee, he would now desire it to be effected by operation of law, rather than by a voluntary disposition, certain to offend his relatives in the male line, likely to provoke criticism and censure, and not unlikely to cause dissension and litigation in the family.

Nor have we, in this instance, as in ordinary cases of revocation, to account for a change in the testator's intentions, whereby his bounty is diverted from one object to another. The disposition by this will was, on the face of the instrument, only provisional. It argued no fixed intention to benefit the Maharanee, for it provided for the substitution of a male successor in her place. The Maharajah had since made up his mind who that successor should be, and believed that he had provided for effecting his intention by operation of law. In these circumstances, the provisional disposition by this will, if not an obstacle to the carrying out of his wishes, had at least become useless and superfluous. These considerations render it highly probable that the conversation to which Mr. Carnegy has deposed did pass between him and the Maharajah. Their Lordships will now consider that gentleman's testimony and the objections that have been taken to it.

The passages material to the question of revocation in Mr. Carnegy's deposition are the following:—

"He spoke to me about having it (the will) withdrawn from the treasury on the eve of my departure on tour across the Gogra (Mr. Sparks' evidence fixes the date of this as some

time in January 1870), and expressed a wish that I should examine the deed and see what provisions he had made for the adoption of an heir. He said he had authorized the Maharanee to name an heir, and it was his wish that the power to adopt or name an heir should be limited to the Dadwa Sahib; that he was apprehensive that he had given her a personal power to adopt any one of the lads of the family; and that if, on examination of the document, I found that his apprehensions were just, he wished me to destroy it, because his intention was, and always had been, that the Dadwa should succeed him; and he had had a special clause inserted in Act I of 1869 to suit the identical case of the Dadwa; so his wishes would be fully met by the document being destroyed and the law being allowed to take its course. Next morning I crossed the Gogra on tour, and was absent several weeks. I wrote demi-officially to Mr. Sparks, the Deputy Commissioner, to get out the will and send it to me, and I also discussed the subject with the Chief Commissioner, Mr. Davies, who, I remember, said that if the will was sealed up and deposited by the Commissioner, I, as Officiating Commissioner, might open it; but, if sealed and deposited under order of the Chief Commissioner, I had better not open it myself. Mr. Sparks unfortunately overlooked the matter, and it escaped my memory during the rest of my tour, and when I returned to Fyzabad I found the Maharajah's health, physical and mental, to be such that I deemed it expedient to take no further steps in the matter, and there it remained. This was in the cold weather of 1869-70."

And in cross-examination he said: "The Maharajah wished his will to be destroyed that the Dadwa Sahib might get the benefit of the 22nd section of Act I of 1869. He said there was no need of the document, as the clause secured his wishes."

The first objection to Mr. Carnegy's evidence is, that it is not corroborated by that of Mr. Sparks, which is also given in the cause. He says, touching this point, "To the best of my recollection, Mr. Carnegy never wrote to me to send him the will. Mr. Carnegy, either verbally or by note, asked me to get out the will and see by whom it was deposited. I requested the Treasury Officer to get out the will and see by whom it was

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deposited, which copy I despatched to Mr. Carnegy. I did not receive any letter, official or demi-official, to return the will to the Maharajah. I did not receive any letter from Mr. Carnegy asking me to return the will, nor did I receive any *khutt* from the Maharajah. I don't remember receiving any."

Upon this testimony it is to be remarked that it confirms that of Mr. Carnegy as to the fact that at the time in question he made some communication to Mr. Sparks touching the Maharajah's will, though there is a material discrepancy between the two depositions as to the precise terms and nature of that communication. To that extent then it corroborates Mr. Carnegy's general statement that he had had a conversation with, and some instructions from, the Maharajah about the will, for otherwise there would be no apparent reason for any correspondence between the two officers on the subject. Mr. Carnegy was examined on the 19th April 1873, when on the eve of his departure for Europe. Mr. Sparks was examined on the 2nd of the following July, and there was no opportunity of recalling Mr. Carnegy and getting him to explain, if he could, the beforementioned discrepancy. It is conceivable that the deposition of each officer may be partially accurate and partially defective; that Mr. Carnegy, after the discussion with Mr. Davies to which he deposes, may have written to Mr. Sparks to the effect deposed to by the latter, and may on another and possibly subsequent occasion have written te the effect to which he himself deposes. The letter or letters (if any) that did pass are not in evidence, and the question of what really passed rests on the accuracy of the recollection of the two witnesses. It may further be observed, as bearing on the general credibility of Mr. Carnegy, that he has expressly sworn to a discussion on this subject with the Chief Commissioner, Mr. Davies. He has, therefore, vouched that gentleman, who might have been called to contradict him, and the discussion, if it took place, presupposes that Mr. Carnegy had some instructions from the Maharajah concerning the will.

Other objections to the testimony of Mr. Carnegy are founded on his conduct. It has been asked why, if he had this alleged authority to destroy the will, he did not exercise it; why, after

his return from his official tour, he did not even inform the Maharajah (who lived until the following October, and, notwithstanding frequent attacks of epilepsy, was occasionally equal to the transaction of business) that the will was still in existence; and above all, why, after the death of the Maharajah, he allowed the widow to be put into possession of the taluq under the will, upon the assumption that the disposition made by it was still in force.

It is impossible to deny that these objections have more or less weight. The following is the explanation which may be set against them. It is clear that the will, from one cause or another, did not reach Mr. Carnegy whilst on his tour; that, according to his own account, he allowed the matter, though of such great importance, to escape his memory, and omitted to press for the dispatch of the document, that after his return he found the Maharajah on the occasion of his visit to him in a deplorable state of health, and wholly unfit for business. So far Mr. Carnegy is confirmed by Mr Sparks. Mr. Carnegy seems then to have jumped to the conclusion that the Maharajah's health, physical and mental, was such as to make it inexpedient to take further action in the matter. If this were Mr. Carnegy's sincere conviction, it may well account for his not acting after his return, on the antecedent authority, by destroying the will. To destroy a will on the parol authority of the testator would in any case be an extremely delicate matter. A man who would have done the act if assured that it would be confirmed if necessary by a person in the full possession of his faculties, would naturally abstain from doing it if he felt that the confirmation (if obtained) might be questioned as proceeding from one of enfeebled capacity, if not of absolute incapacity for business. His conviction of the Maharajah's continuous incapacity for business, though erroneous in point of fact, might also account for his omission to renew the subject, or to inform the Maharajah that the will was still in existence. His conduct after the Maharajah's death seems to be explicable only on the assumption that he may have thought the actual destruction of the instrument was essential to his legal revocation; and that, if he objected to the Maharanee's title on the ground of what

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had passed between himself and her late husband, he would expose himself to criticism and censure without benefiting the Dadwa Sahib, whose interests he may have supposed, in common with other officials, and many of the dependents of the family, would be secured by the Maharanee's exercise of her power in accordance with her husband's intentions.

Their Lordships do not say that this explanation is wholly satisfactory. But the question which they have to determine is not whether Mr. Carnegy's conduct can be completely explained, but whether it be such as renders his evidence untrustworthy. Their Lordships, considering the position and general character of the witness, are of opinion that this is not the case. Upon his general truthfulness neither the Commissioner nor the Deputy Commissioner has cast any suspicion. The former was of opinion that, considering all the circumstances, he could not depend on the accuracy of Mr. Carnegy's recollections of the conversation with the Maharajah. The other Judge says expressly "that the conversation, such as related by Carnegy, passed between him and the Maharajah I have no doubt." Reviewing, however, Mr. Carnegy's subsequent conduct, he came to the conclusion that "Man Singh only expressed an intention that the Dadwa Sahib should succeed him, and of inspecting his will for the purpose of seeing what he had actually written in it regarding his wife's power to adopt, but did nothing more." He also expresses a doubt "whether, supposing revocation had been clearly proved, it would be proper to let this outweigh the existence of the will," implying that something in the nature of cancellation was necessary. Upon these judgments their Lordships observe that, if Mr. Carnegy be accepted as a truthful witness, the more important portion of his testimony can hardly thus be explained away. His recollection may possibly deceive him as to the terms and nature of his communication with Mr. Sparks; but mere imperfection of memory can hardly account for his imagining that the Maharajah gave him authority to destroy the will if no such authority was given. The authority was in itself a thing so unusual and so important, that the words which conveyed it were likely to stamp themselves on the memory. Nor is it easy to see how

such an authority, if not clearly expressed, could be honestly inferred from other words imperfectly remembered. Their Lordships have, therefore, come to the conclusion that Mr. Carnegy's statement of what passed between him and the Maharajah may be accepted as substantially accurate.

If this be so, their Lordships are of opinion that what so passed amounted to a revocation of the will. It cannot, they think, be doubted that the will of a Hindu may be revoked by parol. The cases cited at the Bar show that this was the law of England before the Statute of Frauds was passed. Their Lordships are very sensible of the danger of acting upon such evidence as is ordinarily produced in the Courts in India in order to establish such a revocation, and they desire to say nothing which may induce those Courts to apply the law in such cases otherwise than with extreme caution. Even in the present case their Lordships have come to the conclusion upon which they are about to act with some hesitation, not because they are not perfectly satisfied that the Maharajah had the *animus revocandi*, but because the testimony of Mr. Carnegy is open to the objections which have been considered. It was hardly disputed at the Bar that, if definitive authority to destroy the will was given to him by the Maharajah, that would be sufficient in law to constitute a revocation, although the instrument was not in fact destroyed. In truth, the case would then be almost on all fours with that of *Walcott* v. *Ochterlony* (1), the only difference being that the authority was given here by words, and there by a writing sufficient to satisfy the Statute of Frauds. In that case, as in this, the authority was not exercised by the actual destruction of the will.

Their Lordships see no grounds for not accepting that part of Mr. Carnegy's testimony which says that the Maharajah gave him authority to destroy the will, if on examination he should find that it contained a certain disposition. Nor do they think that this qualification of an absolute order to destroy is material, because the will, being what it was, the authority would have clearly justified its destruction. And they are

(1) 1 Curteis, 580.

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disposed to think that even if the direction to destroy were not, as, upon the whole, they think it is, satisfactorily established, the declaration made by the Maharajah to the principal officer of the district in whose custody the will was, of his desire and intention that the Dadwa Sahib should succeed him by virtue of the newly-passed Statute, and in supersession of the will, would have been in law a sufficient parol revocation.

Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under cl. 4 of s. 22 of Act I of 1869, was entitled to succeed to the taluq; and that he has made out his claim for a declaratory decree to that effect.

The declaration, however, must, their Lordships think, be limited to the taluq and what passes with it. If the Maharajah had personal or other property not properly parcel of the taluqdari estate, that would seem to be descendible according to the ordinary law of succession.

They will, therefore, humbly advise Her Majesty to reverse the decree of the Commissioner of Fyzabad, dated December 24, 1873, and that of the Deputy Commissioner of Fyzabad, dated July 28, 1873; and to declare that the will of the late Maharajah Man Singh of April 22, 1864, was duly revoked by him in his lifetime; and that the plaintiff, Maharajah Pertab Narain Singh, *alias* Dadwa Sahib, was and is entitled, under cl. 4, s. 22, of Act I of 1869, to succeed, as *ab intestato*, to the taluqdari estate of the late Maharajah, including whatever is descendible according to the provisions of the said Statute. Their Lordships are of opinion that, under the peculiar circumtances of this case, the Commissioner exercised a sound discretion in making the costs of the litigation payable out of the taluqdari estate; and that the costs of both parties of this appeal ought to be taxed as between solicitor and client, and similarly dealt with. And they will advise Her Majesty accordingly.

Agents for the appellant: Messrs. *Watkins* and *Lattey*.

Agent for the respondents: Mr. *T. L. Wilson*.

THAKUR SHERE BAHADUR SINGH (PLAINTIFF) *v.* THAKURAIN DARIAO KUAR (DEFENDANT).

P. C.*
1877
Nog. 10.

[On Appeal from the Court of the Commissioner of the Roy Barelly Division of Oudh.]

Estate in Oudh—Title under Sanad from Government—Trust.

Although a sanad granted by the Government of India subsequent to the proclamation of March 1858, of an estate in Oudh, confers an absolute legal title on the grantee, such grantee may, nevertheless, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee of the estate for a third party.

Where the lower Courts, on the ground that the defendant's title under a sanad was absolute, declined to consider evidence which the plaintiff relied on as showing that the defendant really held for him as a trustee, the case was remanded by the Judicial Committee in order that such evidence might be received and considered.

THE suit in which this appeal arises was instituted on the 1st September 1873 in the Court of the Deputy Commissioner of Roy Bareilly. The allegations made in the plaint were in substance as follows:—That Basant Singh, the husband of the defendant Thakurain Dariao Kuar, died without issue on the 12th November 1857; that, shortly before his death, he directed the defendant to adopt the plaintiff as his son, and that, in pursuance of such direction, the plaintiff was so adopted by the defendant on the 25th April 1858; that the defendant, on her husband's death, took possession of his estate, and that, after the confiscation by the British Government of proprietary rights in Oudh, a summary settlement of the estate was made with her; that the plaintiff, who was then a minor, becoming cognizant of these circumstances, was about to take proceedings for the protection of his interests, but was induced to refrain from doing so by the representations made to him by the defendant in the following letter:—

"You should not be misled by others; now the estate and everything is yours. Now I have no more concern than to take my food and clothing. But you are yet a boy; you should

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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therefore allow the kabuliat of the illaka to remain in my name. When you become of age, I will cause the kabuliat to be executed in your name : you may depend upon it, I will not in the least deviate from what I say. But in the event of my not adhering to my promise, you will be at liberty to lay the case before the Court and get the kabuliat of the illaka executed in your name, and then if I make any objection at all, it would be inadmissible ; now you may do as you deem proper. I can do no more than write to you."

That, subsequently, on the 8th May 1861, while the plaintiff was still under age, a sanad was granted to the defendant in the following terms :—

"Know all men that, whereas by the proclamation of March 1858, by His Excellency the Right Honorable the Viceroy and Governor-General of India, all proprietary rights in the soil of Oudh, with a few special exceptions, were confiscated and passed to the British Government, which became free to dispose of them as it pleased, I, George Udney Yule, Officiating Chief Commissioner of Oudh, under the authority of His Excellency the Governor-General of India in Council, do hereby confer on you the full proprietary right, title and possession of the estate of Somerpaha, consisting of the villages as per list attached to the kabuliat you have executed, of which the present Government revenue in rupees is 35,959.

"Therefore this sanad is given you in order that it may be known to all whom it may concern, that the above estate has been conferred upon you and your heirs for ever ; subject to the payment of such annual revenue as may from time to time be imposed, and to the conditions of surrendering all arms destroying all forts, preventing and reporting crime, rendering any service you may be called upon to perform, and of showing constant good faith, loyalty, zeal and attachment to the British Government, according to the provisions of the engagement which you have executed, the breach of any one of which at any time shall be held to annul the right and title now conferred on you and your heirs.

"It is another condition of this grant that, in the event of your dying intestate, or of any of your successors dying intestate,

the whole estate shall descend to the nearest male heir, such as sons, nephews, &c., according to the rule of primogeniture, but you and all your successors shall have full power to alienate the estate either in whole or in part by sale, mortgage gift, bequest or adoption, to whomsoever you please.

"It is also a condition of this grant that you will, so far as is in your power, promote the agricultural prosperity of your estate, and that all holding under you shall be secured in the possession of all the subordinate rights they formerly enjoyed. As long as the above obligations are observed by you and your heirs in good faith, so long will the British Government maintain you and your heirs as proprietors of the above-mentioned estate, in confirmation of which I herewith attach my seal and signature."

That, shortly after obtaining the said sanad, the defendant entered into negotiations for the marriage of the plaintiff to the daughter of one Umrez Singh, who, discovering that the sanad of Somerpaha stood in the name of the defendant, withheld his consent. That, thereupon, in the month of July 1861, the defendant wrote the following letter to Umrez Singh:—

"My good wishes to you. May God make you happy. You hesitate in going through the work. But you should have no hesitation, as I have already adopted Shere Bahadur, who will succeed me. With regard to the entry of his name in the Government register, I will have it done as soon as Shere Bahadur arrives at the age of majority; what I have written is, I think, quite enough."

That the said Umrez Singh, relying upon the representation made in the above letter, consented to the proposed marriage, which was subsequently celebrated. That the plaintiff attained majority on the 12th May 1863, but that the defendant did not then make over to him the said estate, but wasted and alienated parts thereof.

The plaintiff therefore prayed that the defendant might be declared to be a trustee on his behalf of Basant Singh's estate, and that an account might be taken, and the defendant be directed to make good the waste, and pay what should be found due on the account; and "be ordered forthwith to transfer and give

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possession to the plaintiff of the said estate, and in the meantime be restrained from alienating, disposing of, or dealing with, managing, or in any way int.ermeddling with the said estate and property, or the affairs thereof."

The defendant, by her written statement, denied that her husband had given her any authority to adopt the plaintiff, or that she had done so; but stated that she had entertained the intention of making the plaintiff her heir, and had executed a will in his favour, which she afterwards, being dissatisfied with his conduct, revoked; and she denied that the letters put forward by the plaintiff were genuine. She further contended that the effect of the proclamation of the 15th March 1858 was to confiscate all the previous proprietary rights of Basant Singh and that the effect of the summary settlement made with, and the sanad granted to, her, and of s. 3, Act I of 1869, was to confer on her "complete proprietary rights in the estate of Somerpaha, without any regard to previous rights."

The Deputy Commissioner, on the 15th November 1873, without taking evidence, dismissed the suit on the ground that the sanad was not granted subject to the provisions of the Hindu law; and that therefore it was needless to enquire whether plaintiff is or is not the adopted son of Basant Singh, deceased.

The plaintiff appealed from this judgment to the Commissioner of Roy Bareilly, on the ground that the Deputy Commissioner was wrong in supposing that the plaintiff's claim rested on his allegation that he was the adopted son of Basant Singh; and because the Deputy Commissioner should have taken evidence as to the declarations alleged in the plaint to have been made by the defendant in respect of the plaintiff's rights, and if these were found to have been made, should have declared the defendant to have constituted herself a trustee for the plaintiff.

The Commissioner dismissed the appeal in the following judgment, dated the 22nd April 1874:—

"On reconsideration of the proceedings in this case, I find that the suit is really one for possession of the estate on the ground that the defendant holds the estate only as trustee for the plaintiff, who had been adopted by defendant in compliance

with the wishes of her deceased husband. Defendant, however, holds the estate under an unassailable title conferred on her by the British Government, and her possession cannot be disturbed on the grounds urged on behalf of the plaintiff.

"Whether the alleged adoption of the plaintiff took place, and is binding on the defendant, and what effect such adoption would take, whether as simply constituting the plaintiff heir to Basant Singh, or creating a title to succeed to the estate on defendant's death, are questions which have not been directly raised, and need not be decided in this suit, since plaintiff at best could obtain but a declaratory decree.

"The appeal is dismissed with costs."

An application for a review of his judgment was rejected by the Commissioner on the 12th August 1874. The material part of the order passed by the Commissioner in refusing the review is set forth in their Lordships' judgment.

The plaintiff subsequently obtained leave to bring the present appeal to her Majesty in Council.

Mr. *Joseph Graham* appeared for the appellant.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the respondent.

Mr. *Graham*.—The lower Courts ought to have fixed the issues raised by the pleadings, and to have tried these issues on evidence. If the allegations of the appellant in his plaint had been proved, he ought to have been declared entitled to the relief he sought. The decisions of the Courts below proceeded upon an erroneous view of the rights of the respondent under the sanad as against the claims of the defendant. We contend that the respondent took under the sanad in trusts for the appellant, her adopted son. The Courts below refuse to look behind the sanad. In so deciding they overlook the bearing of the defendant's acts and declarations, and more especially her two letters, one written to the plaintiff before, and the other to Amroz Singh after, she obtained the sanad. In these we find a clear admission by the defendant of her position in relation to the plaintiff. The case resembles those

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of *Thukrain Sookraj Koowar* v. *The Government* (1), *Hardeo Bux* v. *Jawahir Singh* (2), and *The Widow of Shankar Sahai* v. *Rajah Kashi Pershad* (3), in all of which their Lordships had held that the grantee under a sanad might be a trustee for a third person. [Mr. *Leith*.—I cannot contend in the face of these cases that if a trust is shown the sanad is to exclude the trust. SIR B. PEACOCK.—Do any of these cases go the length of declaring that by virtue of an agreement made beforehand the sanad is to enure to the benefit of another than the grantee? There seems to be a distinction between an agreement made before and one made after the grant. The Government might be disposed to grant to *A*, but not to *A* as trustee of *B*, who is a rebel. SIR M. SMITH.—No question of that kind arises here. There is no reason why Government should not have granted to *B* if he had come forward.] We say a trust arrangement is disclosed in the letter to Umrez Singh, which is of a date subsequent to the sanad, as well as in the letter to the plaintiff, which is of an earlier date. The point raised by his Lordship Sir B. Peacock does not apply to anything done after the sanad had been obtained. The defendant might then alienate as she pleased. She was bound by the representations made by her in her letter to Umrez Singh. See the case referred to by Lord St. Leonard in *Jorden* v. *Money* (4). [SIR R. COLLIER.—When do you say your right of action accrued? We cannot send back the case if your right is barred by limitation.] The defence of limitation is not raised in the respondent's case.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the respondent.—Assuming the letters to be genuine, we cannot maintain the defence of limitation. So far as the plaintiff's case rests on the letters, his cause of action must be taken to have accrued when he attained majority. [SIR B. PEACOCK.—If the letters amount to a contract to put the plaintiff in possession on his coming of age, the

(1) 14 Moore's I. A., 112.

(2) *See post*; S. C., L. R., 4 Ind. Ap., 178.

(3) *See post*; S. C., L. R., 4 Ind. Ap., 198.

(4) 5 House of Lords Ca., 185, see at pp. 251-255.

period of limitation would be six years. He came of age in 1863.] If the letters express a trust, there can be no limitation. If the letters be set aside, limitation clearly applies. The plaintiff's case is rested on two grounds,—his rights under an adoption, and his rights under a trust. The Courts below have rightly held that the plaintiff's adoption, assuming it to be proved, would give him no right to the estate of Basant Singh which had been confiscated before the adoption took place, and which was afterwards settled with the respondent and granted to her in full ownership. [SIR R. COLLIER.—The only reason for considering the adoption is, that it may throw light on the meaning of the letters and the general truth of the plaintiff's case.] We deny that the letters are genuine, and at any rate they do not come within the methods of alienation provided by s. 13, Act I of 1869. [SIR J. COLVILE —That Act is not retrospective. SIR B. PEACOCK.—Under s. 22, the grantee may alienate to certain persons without the formality of writing.]

Mr. *Graham* replied.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This case has not been tried in a manner altogether satisfactory. Without, however, referring to the previous proceedings, their Lordships think it enough to advert to the final judgment appealed against. The learned Commissioner gave his judgment in these terms:—"Basant Singh died during the Rebellion of 1857, and the alleged adoption of the plaintiff is said to have taken place in April 1858. Before this the general confiscation of the land of Oudh had been declared by the British Government, and it was only in May 1858 that a summary settlement was made with the defendant. At the time, therefore, of the alleged adoption, the title to the estate vested neither in the deceased Basant Singh nor in the plaintiff, nor in the defendant, but in the British Government. Even if it be allowed that there was adoption of plaintiff, and that this, in accordance with Hindu law, conferred upon him all the right of a

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posthumous son of Basant Singh, still neither he nor Basant Singh himself, if he were to rise from the dead, can assail the title under which the defendant holds." So far their Lordships agree with the learned Commissioner, but they are not able to agree with him in the view which he expresses in the second paragraph of his judgment. The learned Commissioner appears not to have been sufficiently acquainted with the tenor of some recent decisions, whereby, although undoubtedly the doctrine if affirmed that the title conferred by the Government is absolute and overrides all other titles, nevertheless it has been held that the grantee under the Government may, by an express declaration of trust, or by an agreement to hold in trust, constitute himself a trustee. The learned Commissioner proceeds in these terms:—"It has, however, been held by the Courts on various occasions that a free gift was made by the Government, and I am entirely of this opinion. The adoption of two letters, said to have been written by the defendant, both of which are set forth in the plaint, place, it is contended, the defendant in the position of trustee. One letter addressed to the plaintiff implies nothing more than a promise to put him in possession of the estate on his becoming of age. The second letter, addressed to Babu Umrez Singh, between whose daughter and plaintiff a marriage was arranged, is to the same effect as the letter addressed to the plaintiff. I can see nothing in these letters to place, the plaintiff and defendant in the position respectively of beneficiary or *cestui que* trust and trustee."

Their Lordships are of opinion that the letters here referred to, if proved (and, as far as they are at present informed, they do not seem to have been proved or disproved), may, coupled with surrounding circumstances, constitute sufficient evidence on which the Court would be justified in holding that the defendant had declared herself or had agreed to be a trustee on behalf of the plaintiff. They think it desirable, therefore, that the suit should be sent back to the Courts in Oudh for the purpose of determining this question. Those Courts will inquire, in the first place, whether the letters are genuine; in the next place, as to the date on which they were written; and,

thirdly, as to the circumstances under which they were written and other surrounding circumstances; and among those circumstances undoubtedly will be the question of the adoption or non-adoption by the defendant of the plaintiff under the will of her husband;—this question being, as before explained, material only as a circumstance bearing upon the question of whether or not she has agreed to be or declared herself to be a trustee, but not in itself constituting any title on the part of the plaintiff.

Their Lordships, in the imperfect acquaintance which they have at present with the facts of the case, think it more convenient to remand the case in these general terms than to settle issues themselves. Either party will be at liberty to propose for the consideration of the Court any issues which they may think material to raise the questions which have been just indicated, and the Court will doubtless raise the proper issues, and determine the questions according to the law as now laid down.

Their Lordships think it right to add that the delay of the plaintiff in not having brought the action until ten years had passed after he had become of age, and his laches in this respect will not entitle him to an account for a period before the commencement of this suit.

Their Lordships will therefore humbly recommend Her Majesty to discharge the decree and orders appealed from, and to remand the suit to the Court of the Commissioner of Roy Bareilly for him to re-try and determine the same, each party being at liberty to propose such issues as they may think material to be settled for trial by the Commissioner.

The costs of both parties of the appeal will be taxed, and a certificate sent with a direction to the Court below to deal with them as costs in the cause.

Agent for the appellant: Mr. *J. Hopgood.*

Agent for the respondent: Mr. *T L Wilson.*

P. C.*
1878
Jan. 15, 16.
& 19.

HURROPERSAUD ROY AND ANOTHER (PLAINTIFFS) *v.* SHAMAPERSAUD ROY AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal]

Interest on Mesne Profits—Act XXXII of 1839.

By the law and practice in India, independently of the provisions of Act XXXII of 1839, a decree might award interest, as of course, on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to.

THIS was an appeal from a decree of the Calcutta High Court, dated the 15th August 1863 (1), modifying a decree of the Principal Sudder Ameen of the 24 Parganas, dated the 18th February 1861.

The facts of the case and the contentions of the parties are fully stated in their Lordships' judgment.

Mr. *Doyne* appeared for the appellants.

Mr. *Leith*, Q. C., and Mr. *A. Souttar*, for the respondents.

The following cases were referred to :—

Rungmala Chowdhrain, petitioner (2), *Asman Singh* v. *Purmessuree Suhaee* (3), *Bamun Das Mookerjee* v. *Tarinee* (4), *Ramruttun Roy* v. *Bhoobhunessuree Debea* (5), *Tekayet Jugmohun Singh* v. *Rajah Neelanund Singh* (6), *Muneeram Acharjee* v. *Sreemutty Turungo* (7).

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—The transaction out of which this suit arose occurred nearly half a century ago, and from it has flowed

* *Present*: SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) The decision of the High Court will be found reported in 2 Sev. Rep., p 60*a*.

(2) Carran's Summary Decisions of Calcutta S. D. A., 195.

(3) 4 Sel, Cas., 176.

(4) S. D. A., 1850, p. 533; and on appeal, 7 Moo. I. A., 169.

(5) S. D. A., 1855, p. 404

(6) S. D A., 1857, p 1812.

(7) 7 W. R., 173.

a continuous stream of litigation, not in all respects creditable to the earlier tribunals of India down to the present day. A history of that litigation, given shortly and clearly, will be found in a report, in the 8th volume of Moore's Indian Appeals, of a judgment of this Committee, which was delivered on the occasion to be hereafter mentioned (1). Their Lordships deem it enough to refer to that case without recapitulating the history, inasmuch as the facts necessary to the determination of the points now before them need no very lengthened statement.

Two brothers, Doorgapersaud Chowdhry and Tarapersaud Chowdhry, of whom Doorga was the elder, entered into an agreement of compromise for the purpose of settling disputes then pending between them on the 4th of April 1829. That agreement of compromise may be sufficiently described for the present purpose as one whereby in substance the elder brother took ten-sixteenths of the ancestral property, and the younger brother six-sixteenths. Tara, the younger brother, disputed this compromise upon various grounds; but it was affirmed by the Court, which was then called the Provincial Court, on the 2nd of September 1829. Tara appealed from that decision to the Court of Sudder Dewanny Adawlut, and the Court of Sudder Dewanny Adawlut affirmed the decision of the Provincial Court and directed possession to be given to Tara of his portion of the property. Tara accepted this decision and endeavoured to obtain his rights under it, and his first step for that purpose was to apply to Mr. Ross, one of the Judges of the Court of Sudder Dewanny Adawlut, who, in concurrence with Mr. Walpole, each sitting alone, had given the judgment affirming the decree of the Provincial Court, to order *wasilat* to be given him. The decree had only decreed possession. The application was made under a circular order, which empowered the Court in such cases to award *wasilat* to be recovered by proceedings in execution; and it claimed *wasilat* from the date of the decision of the Provincial Court. Mr. Ross so far complied with this request as to order *wasilat*, not from the date when it was claimed,

(1) *Doorgapersaud Roy Chowdhry* v *Tarapersaud Roy Chowdhry* 8 Moo. I. A., 308.

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but from the 4th July 1832, the date at which the decision of the Sudder Dewanny Adawlut Court had been given.

The history of the litigation during the next twenty years may be thus summarised. Tara pursued every legal means in his power to obtain his rights under that decree; that is to say, to obtain possession of the property and *wasilat* or the mesne profits for the period during which possession of it had been withheld. The elder brother Doorga endeavoured to defeat his claims by a variety of excuses and pretences, all of which have been found to be false. Tara succeeded in obtaining from time to time possession of certain portions of the property, but he never appears to have succeeded in obtaining any *wasilat*. It may be enough, however, to pass on the year 1853, when Tara obtained an order from Mr. Money for a sum of Rs. 40,000 *wasilat*, and a considerable amount of interest. Doorga appealed against that order, on the ground, which he appears to have raised then for the first time, that Mr. Ross, who made the original order in respect of the *wasilat* in 1832, had acted without jurisdiction, inasmuch as he could not make the order without the concurrence of his colleague Mr Walpole, and the Court of Sudder Dewanny Adawlut gave effect to this objection So that the Court of Sudder Dewanny Adawlut in effect ruled that all the litigation which had gone on for twenty years was absolutely fruitless.

Under those circumstances Tara instituted the present suit in December 1853. Tara and Doorga have long since died, and this appeal is now prosecuted and defended on behalf of their representatives.

The suit came on to be heard before the Principal Sudder Ameen of the day, and he decided that the Statute of Limitations was a bar to the claim of Tara to *wasilat* for more than twelve years before the commencement of the suit. But for those twelve years he gave him *wasilat*, calculated upon the footing of certain *hustabood* papers which were put in by the plaintiff. The plaintiff contended that he was entitled to avail himself of those *hustabood* papers on this ground: he said "the *hustabood* is my "rent-roll of a certain portion of lands which have been made "over to me by my brother. This is some evidence in the

"absence of contradictory evidence of what the rent was before "it was handed over, and therefore of the *wasilat* or mesne "profits to which I am entitled." These *hustabood* papers had been received in the abortive proceedings which have been referred to, and were received in this case by the Principal Sudder Ameen. There were cross-appeals from this judgment, and the case came before the Sudder Dewanny Adawlut in the year 1857, whereupon that Court reversed the decision of the Principal Sudder Ameen, holding that the Statute of Limitations was not a bar to any portion of the claim, and remanded the case to be re-tried *ab initio*, as they expressed it. This judgment of the Sudder Dewanny Adawlut was, on appeal, affirmed by this Board in the judgment before referred to; their Lordships holding that the Statute of Limitations did not apply to Tara's demand, because he had instituted *bonâ fide*, though ineffectual, proceedings for the purpose of obtaining his rights,—not as they expressed it under the agreement alone, but under the judgment enforcing it.

The case was then tried on the remand by another Principal Sudder Ameen. He found that the plaintiff was entitled to *wasilat* from the date of the first judicial decision, in September 1829, of the Provincial Court. On the question of the amount of *wasilat* he rejected the *hustabood* papers, and valued the land at one rupee per beegah. With reference to the question of interest, he decreed interest to the plaintiff from the date of the decree, holding that the claim of *wasilat* must be considered as then for the first time settled and liquidated.

From that decree there was an appeal to the High Court, which varied the decision of the Principal Sudder Ameen as to the time from which the right of the plaintiff to *wasilat* commenced, decreeing that it commenced not from the decision of the Provincial Court in 1829, but from the decision of the Sudder Dewanny Adawlut Court in 1832; they affirmed the decree in other respects. From that judgment of the High Court the present appeal is preferred.

The questions now before their Lordships are—first, from what time the right to *wasilat* commenced; secondly, what should be the amount of *wasilat*; and thirdly, what the amount

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of interest, if any, upon the *wasilat*. Upon the first question it is desirable to look to the terms of the two judgments that have been referred to. The first judgment affirming the compromise is to be found recited (it is nowhere found separately) in the judgment of the Court of Sudder Dewanny Adawlut in these terms: "It is ordered that the deed of compromise and "release be admitted, that the case be struck off the file of this "Court, and that the parties conform to these stipulations. "The Court on becoming acquainted with it shall enforce the "observance of the same on the refusing party."

Now one of the stipulations was that Doorga, the elder brother, who was in possession of the property, should relinquish to his younger brother six-sixteenths. It, therefore, appears to their Lordships that the direction to conform to these stipulations is a direction, though possibly an informal one, that Tara should be put in possession of that property. This decision was confirmed in these terms by the Court of Sudder Dewanny Adawlut: "Therefore, in concurrence with the aforesaid gentle-"man"—that is the Judge of the previous Court—"Ordered, "that the appeal preferred by the appellant be dismissed, and "that the decision passed in the Provincial Court of Appeal, "dated the 2nd of September 1829, be affirmed; that, should "the appellant agreeably to the deeds of compromise, not have "received possession of his share, he be put in possession of the "same on the execution of decree." It appears to their Lordships that this decree of the Sudder Dewanny Adawlut must not be taken as establishing for the first time any new right of either of these parties, but as simply affirming, with an explanation, for it is nothing more, the former decree. The rights of the parties, therefore, depend upon the former decree, and it is the former decree which is effective, and which had to be executed. It appears to their Lordships, therefore, that Doorga, after the first decree, receiving as he did all the rents and profits of the property, received the rent of six-sixteenths of it for the use of his brother, and that he is bound to account to his brother for those rents and profits. They, therefore, agree with the view taken by the Principal Sudder Ameen upon this question, and disagree with that taken by the High Court.

The second question is as to the amount of wasilat. It has been contended that the Principal Sudder Ameen was bound to accept those *hustabood* papers as fixing the rate of wasilat, which undoubtedly was a good deal higher than the rate which he allowed. He was bound to do so, it is said, because they had been accepted by the previous Sudder Ameen, and by the Courts in former proceedings. But their Lordships do not concur in this view. It may be well here to read the terms in which the judgment of the Court remanding the case is couched: "As this judgment re-opens the question of *wasilat* from the "date of the deeds of adjustment, the whole evidence on that "matter will require reconsideration. We therefore remand the "case that the whole question of *wasilat* may be taken up and "considered *ab initio*."

If the Court had expressed themselves satisfied with the award of *wasilat* within the last twelve years, and only directed an inquiry as to the additional *wasilat* accruing before that time, they might have so expressed themselves; but their Lordships think it probable that they expressed themselves as they have because there was a cross-appeal, in which the validity of these *hustabood* papers would have been disputed, abstaining from giving judgment upon that question, and remitting the whole matter to the Principal Sudder Ameen. The Principal Sudder Ameen expressed himself as dissatisfied with those *hustabood* papers, which appear to have been put in, but of which, as far as it appears, there does not seem to have been any proof given to him, although some proof seems to have been given of them on former occasions. He describes them as concocted at home by the plaintiff, and questions their genuineness chiefly on the ground that they give an annual value to the property greater than that which it bore at the time of his judgment; the value of land having notoriously very much increased since the *wasilat* claimed had accrued. He also observes that he directed, for the benefit of the plaintiff, an inquiry before an ameen as to the value, which the plaintiff declined. Under these circumstances he forms, undoubtedly, a somewhat rough estimate of the annual value of the property as one rupee per beegah. It may be that, under the circumstances, the Principal Sudder Ameen might

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have been justified in accepting and acting upon these *hustabood* papers, but it is quite another question whether their Lordships are to say that he was bound to act upon them. It appears to their Lordships that this is a decision upon questions of fact, namely, the genuineness of these *hustabood* papers, and the actual value of the land, and that decision having been affirmed by the High Court, they see no sufficient reason to take this case out of the ordinary rule, whereby they affirm a decision on a question of fact come to by two Courts.

The remaining question is that of interest. And here it may be as well to refer to the terms of the Statute, Act XXXII of 1839, very much in accordance with the Statute of 3 & 4 Will. IV in this country, which has given rise to a great number of decisions, all of which are not easily reconcilable. The words of the section are: "It is, therefore, hereby enacted that, upon all "debts or sums certain, payable at a certain time or otherwise, "the Court before which such debts or sums may be recovered "may, if it shall think fit, allow interest to the creditor at a "rate not exceeding the current rate of interest from the time "when such debts or sums certain were payable, if such debts or "sums be payable by virtue of some written instrument at a "certain time, or if payable otherwise, then from the time when "demand of payment shall have been made in writing, so as "such demand shall give notice to the debtor that interest will "be claimed from the date of such demand until the time of pay-"ment." If the Statute had stopped here, it might be that the Principal Sudder Ameen and the Court were right in saying that there was no actual ascertained or liquidated demand until the *wasilat* was determined by the decree. But these words follow: "Provided that interest shall be payable in all cases in which "it is now payable by law." And that refers their Lordships to the state of the law and the practice in India independently of the Statute. They have taken some pains to ascertain what that law and practice has been, and have been referred to a number of cases upon the subject. It may be enough now to quote a case (1), which is to be found reported in Carrau's Report of

(1) *Rungmala Chowdhrain, petitioner*, Rep. Sum. Cas., 195.

Summary Cases in the Presidency Sudder Court, of the date of October 1st, 1850, where certain resolutions were come to at a sitting of all the Judges of the Court, and among those resolutions was this: "Interest on mesne profits may be awarded as "of course from date of suit in a decree; when, however, interest "is awarded from an earlier, or from a later date than of suit, "special reasons should be assigned in the decree." Their Lordships find that this resolution has been, to a great degree, acted upon in subsequent cases; indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided. But having regard to the circumstances of this case, and among them may be stated the very great delay, which has not been thoroughly explained, in the prosecution of this appeal, their Lordships think it enough that the plaintiff should have a decree for interest upon the mesne profits decreed to be calculated from the commencement of the suit up to the date of the decree. The decree will carry interest on the whole amount decreed from its date, at the usual rate of 12 per cent.

They will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the decree of the Principal Sudder Ameen be affirmed as to the amount decreed to the plaintiff for mesne profits, and reversed as to the residue; and that it be ordered that the defendant pay to the plaintiff interest on the amount decreed for mesne profits at the rate of 6 per cent. per annum, to be calculated from the date of the commencement of the suit to the date of the decree of the 18th February 1861, and that the costs in the first Court be ascertained and be paid by the parties respectively in proportion to the amount to be decreed and disallowed by the decree so to be amended, and that the defendant do pay interest at the rate of 12 per cent., per annum upon the total amount to be decreed by the decree so to be amended as aforesaid, from the date of the decree of the 18th February 1861 to the date of realization; that the costs of the appeal in the High Court be assessed and ordered to be paid by the parties to that appeal respectively in proportion to the amounts to be decreed and disallowed by the decree to be

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amended as aforesaid. And it will be ordered that the respondents do pay the costs of this appeal.

Agents for the appellants : Messrs. *Barrow* and *Barton*.

Agents for the respondents : Messrs. *Young*, *Jackson*, and *Beard*.

As to allowing interest on mesne profits prior to date of suit, the following cases may be noted :—*Protap Chunder Borooah* v. *Ranee Surno Moyee*, 11 W. R., 151 ; *Chowdhry Wahed Ali* v. *Musst. Jumaye*, 19 W. R., 87 ; *Bibee Budlun* v. *Syud Fazloor Ruhman*, 23 W. R., 449.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Markby Mr. Justice Mitter, and Mr. Justice Ainslie.

Practice—Appeals to High Court—" Decree " —" Judicial Proceedings "— " Procedure "—Saving of Right of Appeal—Act XXIII of 1861—*General Clauses Act* (*Act I of* 1868), *s.* 6—*Act VI of* 1871—*Act VIII of* 1859 —*Act X of* 1877, *ss.* 3, 540, 588, 591, 647—24 *and* 25 *Vict.*, *c.* 104, *s.* 9—*Letters Patent*, 1865, *cl.* 16.

In all suits instituted before Act X of 1877 came into force, in which an appeal lay to the High Court under Act VIII of 1859, and appeal still lies notwithstanding the repeal of that Act by Act X of 1877.

Per GARTH, C. J.—A suit is a " judicial proceeding," and the words "any proceeding" in s. 6 of Act I of 1868—include all proceedings in any suit from the date of its institution to its final disposal, and therefore include proceedings in appeal. The word " procedure " in s. 3, Act X of 1877, has not the same meaning as the word " proceedings " in the abovementioned section.

The proceedings in a suit instituted before Act X of 1877 came into force, including a special appeal if the old Code allowed one, go on to the end of the suit notwithstanding the repeal of the old Code. The "procedure," that is to say, the machinery by which those proceedings are conducted, is, after decree, to be that provided by the new Code.

Per JACKSON, J.—The word " decree," as defined in Act X of 1877, does not include " orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree.

The power of the High Court to hear appeals from the Civil Courts in the interior is regulated by Act VI of 1871.

Section 6 of Act I of 1868 covers proceedings taken in execution of decree which have been commenced before Act X of 1877 came into force.

Per MARKBY, MITTER and AINSLIE, JJ.—Clause 16 of the Letters Patent of 1865 empowers the High Court to hear appeals in all cases in which an appeal lay under Act VIII of 1859.

THE facts of these cases, so far as they are material, appear from the referring orders.

No. 360 OF 1877.

RUNJIT SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* MEHERBAN (KOER DECREE-HOLDER).*

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Baboo *Nogendro Nath Roy* for the appellants.

Baboos *Kali Kishen Sen* and *Joy Gopal Ghose* for the respondent.

THIS is an appeal against an order of a District Judge made in an appeal arising out of the execution of a decree. The decision of the lower Appellate Court, refusing to allow execution to proceed on account of limitation, was made on 23rd August 1877. The second appeal was filed in this Court on the 19th November. The Code of Civil Procedure came into force on the 7th October, and objection is taken that the appeal does not lie. The 3rd clause of s. 3 is in these words:—"Nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force." This not being an appeal presented before the Code came into force, the exception does not apply. There is no provision in the Code that we can discover like s. 387 of the repealed Act, VIII of 1859, which expressly saves any right of appeal which any party would have had but for the passing of the Act. Section 588, Code of Civil Procedure, is not relevant, because the order made either in the first or in the second Court was not an order under the Code Any authority of law for such an appeal, which rested on

* Appeal from an order of J. M. Lowis, Esq., Judge of Bhagulpore, dated the 23rd August 1877, reversing a decree of Moulvi Mahomed Nuru Hosain, Munsif of Begusarai, dated the 17th March 1877.

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Act VIII of 1859, has disappeared with the repeal of the Act. The appeal is, therefore, clearly inadmissible unless it can be supported by s. 584. This section can only apply if the order complained of comes within the category of "decrees." It apparently is not a decree. The point is one of considerable importance, and we think it should be argued before a larger number of Judges.

L. S. JACKSON.

L. R. TOTTENHAM.

No. 2 OF 1878.

RAJ KUMARI DABI CHOWDRRANI (JUDGMENT-DEBTOR) v. MIS. SURAM MUNDOL (DECREE-HOLDER).*

Baboo *Srinath Das* for the appellant.

Baboo *Gurudas Banerji* for the respondent.

THIS is an appeal against an order passed under s. 202, Act VIII of 1859, on 15th September 1877. The appeal was presented in November, when Act VIII of 1859 had ceased to be law, and was replaced by Act X of 1877.

It is objected that no appeal lies, since s. 588 (*b*), on which the appellant relies, refers to orders passed under the Act of 1877, and not to those under Act VIII of 1859; and that even if the latter Code of Procedure conferred the right of appeal, that right has gone with the repeal of that Act.

We think it right to refer this matter to be decided by a Full Bench to which many similar matters have already been referred.

W. MARKBY.

H. T. PRINSEP.

* Appeal from an order of Baboo Mothura Nath Gupto, Subordinate Judge of Moorshedabad, dated the 15th September 1877.

No. 26 OF 1878.

HARAN CHUNDER CHUCKERBUTTI (APPELLANT) *v* RAKHAL CHUNDER CHOWDHRY AND OTHERS (RESPONDENTS).*

Baboo *Troyluckho Nath Mitter* for the appellant.

Baboo *Durga Mohun Das* for the respondents.

A preliminary objection is raised to the hearing of this second appeal, that it is not allowed by the Code of Civil Procedure of 1877, under which it has been preferred; and as we understand that other cases involving the same point have been referred for decision to a Full Bench, we think it right that this case should also be referred.

The plaintiff obtained a decree against the defendant, the holder of a saleable undertenure, for arrears of rent, and, in execution of that decree, applied for the sale of the defendant's movable property. The defendant objected, insisting that the undertenure should first be sold.

The Court of first instance held that the undertenure should first be sold, and refused to sell the defendant's movable property.

On an appeal preferred under the now repealed Code of Civil Procedure, the District Judge set aside this order, holding that the decree-holder could not be compelled "to execute his decree otherwise than as he wishes, and as in fact the law tells him, he should."

The point which we refer to the Full Bench is, whether, under the Code of 1877, a second appeal lies against this order.

W. MARKBY.

H. T. PRINSEP.

* Appeal from an order of H. T. Sutherland, Esq., Officiating Judge of Backergunj, dated the 5th October 1877, reversing an order of Baboo Durga Churn Sen, Officiating Munsif of that district, dated the 17th March 1878

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No 27 OF 1878.

OMUR ALI KHAN AND OTHERS (JUDGMENT-DEBTORS) v MOHAMED SABARI (DECREE HOLDER) *

Baboo *Nogendro Nath Roy* for the appellants.

Baboo *Juggut Durlobh Basak* for the respondent.

No. 30 OF 1878.

KHUNDKAR MOHAMED FOUSICAL ISLAM (JUDGMENT DEBTOR) AMIRUNNESSA BIBI (DECREE-HOLDER) †

Baboo *Rajendro Nath Bose* for the appellant.

Baboo *Kishori Mohun Roy* for the respondent.

THESE appeals are preferred against orders passed on appeal by the District Judge under the provisions of Act VIII of 1859, and the appeals have been preferred after the new Code, Act X of 1877, came into operation

The orders confirm the decision of the first Court rejecting applications to set aside *ex parte* decrees under s 119, Act VIII of 1859.

The new Code contains no provision for appeals against orders rejecting such application, and no appeal will now lie (1), but if the Judge's orders on appeal are considered to be decrees, an appeal will lie under s. 584, Act X of 1877.

The question is one with respect to which we have considerable doubt, and as somewhat similar questions as to the scope of s. 584 are to come under consideration of a Full Bench, we are desirous of submitting this point to it also.

* Appeal from an order passed by E. S Mosely, Esq, Judge of Mymensingh, dated the 27th September 1877, affirming an order of Baboo Mohendro Nath Roy, Munsif of Bazitpore, dated the 19th June 1877.

† Appeal from an order passed by the Officiating Additional Judge of Rajshahye, dated the 3rd October 1877, affirming an order of the First Subordinate Judge of that place, dated the 13th March 1876

(1) 1 Cal. Rep, 402

Whether s. 584, Act X of 1877 gives this Court jurisdiction to hear appeals from orders passed in appeals, respecting applications for setting aside *ex parte* judgments, such orders having been passed under the provisions of Act VIII of 1859?

R. C. MITTER.

A. T. MACLEAN.

No. 33 OF 1878.

LOHARAM ROY (JUDGMENT-DEBTOR) *v.* SRIMONTO CHUCKERBUTTY (DECREE-HOLDER).*

Baboo *Bhowani Churn Dutt* for the appellant.

Baboo *Grish Chunder Chowdhry* for the respondent.

THIS appeal was filed on the 24th January 1878 under the new Code of Civil Procedure.

The appellant in this Court is a judgment-debtor.

The decree-holder sued out execution for possession, mesne profits, and costs. The Subordinate Judge found that he had already received the rents of the lands covered by the decree from 1281. He, accordingly, directed an enquiry to be made as to the amount of mesne profits recoverable for the period extending from Srabun 1269 to the end of 1280.

In respect of costs he decided that the claim of the decree-holder was correct except in respect of Rs. 57-7-4, costs incurred in the High Court, which had been paid into Court on the 30th March 1875.

The judgment-debtor appealed to the District Court.

In respect of mesne profits, the Judge states that the decree is silent as to the date from which mesne profits are to be calculated; he holds that as the decree provides that the amount shall be determined in execution of decree, it is competent to the Court executing the decree to fix the period over which the calculation is to extend. He gives a further reason for dismissing

* Appeal from an order of H. B. Lawford, Esq., Judge of Nuddea, dated the 30th November 1877, affirming a decree of Baboo Mohendro Nath Bose, Subordinate Judge of that district, dated the 5th August 1876.

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the appeal on this head,—namely, that the appellant had not raised the question in the Court below.

In respect of costs, the Judge, after setting out the facts, decided that the decree-holder is entitled to the costs claimed and allowed by the first Court.

The decree-holder was plaintiff in the suit; he succeeded in the Court of first instance and in the first Appellate Court. On special appeal by the defendant, the judgment of the lower Appellate Court was cancelled, and the case remanded. On the remand the lower Appellate Court came to a different conclusion, and dismissed the suit. There was then a special appeal by plaintiff, and the High Court reversed the second judgment of the lower Appellate Court, and treating the case as remanded, proceeded to try the regular appeal by the defendant as called up from the Court below.

The original appeal so brought before the High Court was dismissed, and the judgment of the first Court was affirmed.

The decree contains no reference to the costs of the first hearing in the High Court nor to the costs incurred in the lower Appellate Court after remand; but the Judge is of opinion that as this Court confirmed the original decree in favour of the plaintiff, and gave him his costs, it was its intention that the plaintiff should recover all the costs of the litigation.

The first question to be determined is whether any second appeal will lie in this case, or whether the order of the first Court is one falling under cl. (*j*), s. 588, in which consequently a second appeal is barred by the last clause of that section.

As the question of the construction of cl. (*j*), s. 588, has been referred to a Full Bench for consideration, we think this case ought to go up at the same time.

W. AINSLIE.

H. T. PRINSEP.

No. 48 OF 1878.

SRINATH BANERJI (JUDGMENT-DEBTOR) *v.* TROILOKHO NATH BISWAS (DECREE-HOLDER).*

Baboo *Jugut Chunder Banerjee* for the appellant.

Baboo *Srinath Dass* for the respondent.

WE think it right to refer this case to be considered by the Full Bench together with many cases now before it involving the right of appeal under the present Code of Procedure.

The first Court held that execution was barred by limitation. On appeal made under Act VIII of 1859, the District Judge of Nuddea set aside this order as erroneous.

The point for consideration is:—Is there the right of a second appeal?

It is contended before us that this order does not fall within s. 588, Act X of 1877; but that it is a "decree" within the definition given in s. 2, and that therefore, a second appeal lies under s. 584.

W. MARKBY.
H. T. PRINSEP.

No. 323 OF 1877.

SURENDRO NATH PAL CHOWDHRY AND OTHERS (DECREE-HOLDERS) *v.* CHUNDER CUMAR ROY AND OTHERS (JUDGMENT-DEBTORS).†

Baboos *Bhowani Churn Dutt* and *Kali Mohun Das* for the appellants.

Mr. *H. Bell* and Baboos *Unnoda Pershad Banerjee* and *Bungshee Dhur Sen* for the respondents.

THE appellants, as assignees of a decree, applied under s. 208, Act VIII of 1859, to execute that decree; but, on 17th August last, that application was rejected by the District Judge of Jessore.

* Appeal from an order of H. B. Lawford, Esq., Judge of Nuddea, dated the 15th December 1877, reversing an order of Baboo Troilokho Nath Mitter, First Munsif of Bongong.

† Appeal from an order of C. A. Kelly, Esq., Judge of Jessore, dated the 17th August 1877.

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They have now appealed against that order, but between the date of the Judge's order and the filing of this appeal the law has changed. Act VIII of 1859, under s. 208 of which that order was passed, has been repealed with the rest of that Act, and is now replaced by s. 232, Act X of 1877.

A preliminary objection is taken that there is no right of appeal.

Now, as the law stood when the order under appeal was passed, we have no doubt that there was no appeal, and this has been repeatedly held by this Court; but it is doubtful whether the appeal being presented under the new Code, an appeal lies (1) by reason of there being no appeal under the law in force when the order was passed, and (2) supposing that this is no bar, whether there is any appeal allowed by the Code of 1877.

The first point requires no explanation, but as regards the second point, we think it right, in referring this case to the Full Bench to be considered with numerous other cases of a similar nature, to state the provisions of law bearing on it, and which require authoritative explanation.

Section 244, Act X of 1877, which corresponds to s. 11, Act XXIII of 1861 (now repealed), by introducing in (*c*) the words "or their representatives," seems to contemplate making parties to a decree or their representatives (which would include an assignee) identical in such matters with which a Court is competent to deal when executing a decree. And in s. 588 (*i*) an appeal is allowed against "all orders under s. 244 as to questions relating to the execution of decrees *of the same nature with appealable orders made in the course of a suit.*"

Therefore, supposing in the first point the answer of the Full Bench is, that this case is governed entirely by the present Code with regard to the right of appeal, and quite irrespective of there being no appeal under the law in force when the order appealed was passed, then it will be necessary to determine the effect of these concluding words in s. 588 (*j*), which we have italicised, and whether they would allow an appeal in the present case.

W. MARKBY.
H. T PRINSEP.

Baboo *Nogendro Nath Roy* for the appellant in No. 360 of 1877.—From s. 244 of the Civil Procedure Code it appears that certain questions arising between the parties to a suit and relating to the execution of decrees are to be determined by the Court executing the decree, and not by a separate suit. This case comes under cl. (*c*): "any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution of the decree." The first part of the section says that "the following questions shall be determined by the order of the Court executing a decree" But notwithstanding I contend that this order from which we appeal is an order under s. 584, and is defined in s. 2. Section 584 says, "unless when otherwise provided in this Code or by any other law, from all decrees passed in appeal by any Court subordinate to a High Court, an appeal shall lie to the High Court." If I can satisfy the Court that the order in this case was a decree, the question is at an end. Clause (*c*) of s. 584 says, that "an appeal may lie if there has been a substantial error or defect in the procedure as prescribed by this Code or any other law, which may have produced error or defect in the decision of the case upon the merits.' The word "case" is used in s. 372 of the old Code. The 2nd section defines "decree" to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied." "Other judicial proceeding" in this definition would *primâ facie* include proceedings in execution arising between the parties to a suit in executing the decree. [GARTH, C.J.—An order merely ascertaining the amount which the judgment says shall be given to the plaintiff is not part of the decree.] My contention is, that all orders under s. 244 are decrees. The formal order of the Court embodying the determination by the Court of questions arising under that section is a decree within the meaning of the Code. That appears from s. 588. Appeals lie from the orders mentioned in cls. (*a*) to (*i*), which are interlocutory orders made in the course of a suit. Then cl. (*j*) says that appeals shall lie from "orders under s. 244 as to questions relating to the execution of decrees of the same nature with

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appealable orders made in the course of a suit." [JACKSON, J.—Do not the framers of the Code intend to distinguish between "orders" and "decrees?" They say that a person having an order capable of execution shall be considered a decree-holder. That would have been unnecessary if an order was a "decree."] It appears that all persons who have orders in their favour entitled to execution are decree-holders. The word "decree-holder" is defined to mean "any person in whose favour a decree or any order capable of execution has been made." That means something more than the holder of a decree. The intention of the Legislature evidently was, that "decrees," as defined in s. 2, should include orders under s. 244. I contend that whenever a question arising between parties in the course of execution proceedings is determined, such order is appealable. There were appeals under the old Code. If the order of the lower Court was a decree, then even if the order of the lower Appellate Court is taken as a remanding order, there is an appeal under cl. (*w*) of s. 588.

Many important points arise in the course of execution proceedings, and it must have been the intention of the Legislature to allow an appeal. Act VIII of 1859, s. 372, was not very clear, but in *Mahomed Hossein* v. *Sheikh Afzul Ally* (1), it was held that an appeal would lie. Sir B. Peacock says:—"It has been very properly urged by the vakeel in support to the special appeal that, unless a special appeal will lie, there is no remedy against errors or defects in law in decisions passed by the first Appellate Court, inasmuch as s. 11 (of Act XXIII of 1861) expressly provides that the questions therein mentioned shall be determined by the Court executing the decree and not by regular suit, and allows an appeal from the order passed. Now, difficult points of law may arise in the execution of a decree." Section 11 of Act XXIII of 1861 has been re-enacted in s. 244, and the same reasons are now applicable. Even if it is held that this order is not a decree within the Code, an appeal will lie under the last clause of s. 589, which provides, that "when an appeal from any other order is allowed by this

(1) Marsh., 296.

chapter, it shall lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, or when such order is passed by a Court (not being a High Court), in the exercise of appellate jurisdiction, then to the High Court." These words are wide enough to include orders made for the first time in appeal, as in this case. Even if there is no appeal under the new law, there has been a sufficient saving under the last clause of s. 3 corresponding with s. 307 of Act VIII of 1859.

Baboos *Kali Kishen* and *Joygopal Ghose* for the respondents.—In the Code there are distinct provisions as to when decrees are to be recorded; there are also provisions applicable to framing appeals from the first Court and second Court. Sections 205 and 206 show that, in a suit after judgment has been pronounced, a formal decree is to be drawn up. There is no provision for framing decrees with respect to execution-proceedings; they are dealt with as applications. Section 647 refers to miscellaneous proceedings. In these cases no formal decree is recorded; judgment is given and a certificate granted. [JACKSON, J.—The final order in a certificate case would be the decree; the proceedings are to be conducted as nearly as possible according to the Code. AINSLIE, J.—Can you execute an order?] A holder of a decree applies to the Court to enforce it under the Code; there is no provision for executing an order. The order of the District Judge is not a decree. The provisions as to execution-proceedings up to final execution are contained in the first part of the Code. Appeals come under a different part; there is no provision for recording decrees in matters of execution, and the distinction between decrees and orders is preserved throughout the Code. Section 230 provides that execution shall be taken out by the decree-holder, and orders are then passed. Sections 212 and 244 show that the distinction between decrees and orders is kept up. The Act provides for appeals from decrees and appeals from orders. There is no provision for an appeal from an order of this nature, and unless it is held to be a decree, no appeal lies. It has been contended that the last clause of s. 3 re-enacted s. 387 of the old Code. We submit

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that the Legislature intended to give only one appeal, and did not intend to give a special appeal in miscellaneous matters; and therefore that the provisions of s. 387 as to special appeals were omitted intentionally. This intention is further shown by s. 588, which provides that the orders passed in appeal under it shall be final.

Baboo *Bhowani Churn Dutt* and *Kali Mohun Das* for the appellants in suit No. 323 of 1877 contended that an appeal lay under ss. 540 and 588, cl. (*j*), of Act X of 1877; and that the appellants were "parties to the suit," and therefore had the same rights of appeal as their vendors. They referred to *Abidunnissa Khatoon* v. *Amirunnissa Khatoon* (1) and *Huro Loll Dass* v. *Soojawut Ali* (2).

Mr. *H. Bell* for the respondents.—The case is concluded by *Sooba Bebee* v. *Fukurunnissa Begum* (3), where it was decided that the alleged, but not proved, transfer of a decree does not constitute the alleged transferee a party to the suit merely by his applying for execution of the decree.

The other cases were not argued.

The opinions of the Full Bench were delivered by

No. 360 OF 1877.

GARTH, C.J.—I think that the special appeal in this case is preserved to the appellant by s. 6 of Act I of 1868, which is in these words:—"The repeal of any Statute, Act, or Regulation shall not affect any proceedings commenced before the Repealing Act shall have come into operation."

It was held by a Full Bench of the Bombay High Court in the case of *Ratanchand Shrichand* v. *Hanmantrav Shivbakas* (4) that a suit is a judicial proceeding, and that the words "any proceedings" in the above section included all proceedings in any suit from the date of its institution to its final disposal; and, therefore, included proceedings in appeal.

(1) I. L. R., 2 Calc., 327; S. C., L. R., 4 I. A., 66.

(2) 8 W. R., 197.

(3) 1 Cal. Rep., 331.

(4) 6 Bom. H. C. Rep., 166.

I quite agree in that view of the section. This suit was instituted before the new Civil Procedure Code came into operation; and I consider that, by force of the above section, the proceedings in this suit, including the special appeal, which is an essential part of those proceedings, are to go on to the final end of the suit, notwithstanding the repeal of the old Code.

There is nothing in the new Code, as far as I can see, which militates against this view.

Section 3 certainly provides that "nothing contained in the new Code shall affect the procedure prior to decree in any suit instituted before that Code comes into force;" and the reasonable inference from these words is, that the new Code is to affect the procedure *after decree* in any such suit.

But I do not read the word "procedure" in this section as meaning the same thing as the word "proceedings" in s. 6, Act I of 1868.

The proceedings in any suit commenced before the new Code comes into operation are to go on as before, including a special appeal, if the old Code allowed one; but the "procedure," which I understand to mean the machinery by which those proceedings are conducted, is, after decree, to be that which is provided by the new Code.

If there is no machinery provided by the new Code in case of a special appeal like the present, the old machinery must be used.

I am aware that, in the case of *Framji Bomanji* v. *Hormasji Barjorji* (1), the word "procedure" is used by Sir R. Couch in a more extended sense; but the decision in that case did not depend, as it seems to me, upon the meaning of the word "procedure."

The question there was, whether, by the Charter of 1865, the right of appeal to the High Court, which was given by the previous Charter of 1862, was taken away; and (whether that was or was not properly called an alteration in the procedure) the Court held, and I think very properly, that the right of appeal to the High Court was taken away by the Charter of 1865.

(1) 3 Bom. H. C. Rep., 49.

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At the time when that case was decided, Act I of 1868, the General Clauses Act, had not been passed; and therefore the effect which s. 6 of that Act might have upon proceedings in any pending suit was not considered.

The only other provision in the new Code to which I think it necessary to refer is s. 591, which enacts, that, "except as provided in Chapter XLIII, no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction." But this provision appears to be clearly prospective. The appeals allowed by Chapter XLIII are only appeals from orders made *under the new Code;* and the whole of the chapter, as it seems to me, is intended to apply only to *future orders* to be made under the new Code.

I am, therefore, of opinion that this appeal should be admitted.

This decision will govern the other cases numbered 2, 26, 27, 33, and 48 of 1878, which are also referred to us, and which depend upon the same principle.

In all the above cases therefore, I consider that the appeals should be admitted.

In No. 323 of 1877 no appeal would have been allowed under the old Code; and as the new Code does not confer any right of appeal in such a case, the appeal must be dismissed with costs.

JACKSON, J.—The difficulty in these cases generally has arisen from the repeal of the Act, under which they would have been cognizable, without the simultaneous enactment of any provision saving the right of appeal; and it has been proposed to get over the difficulty by putting some force on the word "decree" as defined in the Code. A good deal of discussion has also arisen upon the terms of the last clause of s. 3.

The appeal given by s. 588 of the present Code applies to orders made under the Code and to no others, and the finality given by the same section to appellate decisions of that nature is confined to orders passed in appeals under that section.

The word "decree" cannot, in my opinion, include orders, either original or appellate, upon matters arising in the course of a suit or in execution of the decree.

The decision of the Appellate Court on an appeal from the original decree is, in truth, the result of the decision of the suit by that Court, and, therefore, comes at once within the definition of a "decree."

The judicial proceedings referred to in the same definition are, I think, those provided for in s. 647, and are altogether outside regular suits.

To adopt any other interpretation, and to hold that judicial proceedings in the definition clause include proceedings in a suit before or after decree, would be, in my opinion, to introduce needless and extreme confusion into the provisions of the Code.

The difficulty created by s. 3 arises mainly from the use of the ambiguous word "procedure," which evidently has two senses, and is employed in this very Code sometimes in one and sometimes in the other sense. In one of the two, it includes all the remedies or modes of relief to which a suitor is entitled; and in the other it denotes merely the steps which are to be taken by the Court or its officers in ascertaining the rights of litigants, in putting them into possession of that which is found to be their due, in conducting its own proceedings or enforcing its own decisions. The embarrassment which has arisen entirely disappears if we limit the word "procedure" to that meaning which, I apprehend, it was intended to bear, and generally does bear in most places where it occurs in the Code, *viz.*, the rules of practice whereby "rights are effectuated through the successful application of the proper remedies." I conceive that the Code is chiefly meant to contain as complete a collection as possible of those rules, and that, although we find in it here and there declarations as to those cases in which appeals shall or shall not lie, this is done for the sake of convenience and not because those provisions form a part of procedure strictly so called. Those declarations govern the cases to which they are expressly applicable, and as to other cases they will depend either on the words of actual preservative enactments, or on the general principles applicable to the retrospective force of Statutes. If this be so, it follows that the last clause of s. 3 taken by itself has really no effect upon this question, but relates only to the application of the rules of practice

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contained in the Code. We cannot, I think, nor is it necessary that we should, rely for the purposes of this case on cl. 16 of the Letters Patent of 1865. In the first place it seems to me that the 16th clause only gave jurisdiction in the sense of enabling the High Court to try the appeals lawfully coming before it, which is, in my opinion, a very different thing from an enactment conferring on the subject a right of appeal. But in the second place, by the 44th clause, the Letters Patent are expressly made subject in all particulars to the legislative powers of the Governor-General in Council, and subsequently the Indian Legislature has, by Act VI of 1871, declared in s. 21, that "appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court." And by s. 22, that "appeals from the decrees and orders of Subordinate Judges and Munsifs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceed Rs. 5,000, in which case the appeal shall lie to the High Court." That the limiting words "when such appeals are allowed by law" extend to the latter part of the sentence I cannot doubt, either on grounds of grammatical construction, or with reference to the reason of the thing; and thus, by the enactment of a competent Legislature, the power of hearing appeals given to the High Court is expressly restricted to those cases in which an appeal is allowed by any law in force. But even without this express enactment the result, in my opinion, would have been the same. I have already observed on what seems to me the distinction between enabling a Court to hear appeals and conferring on parties the right of appeal. But with reference to my second reason for thinking the clause inoperative, it has been pointed out that the Court is there directed to exercise "appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations *now in force*," and it is suggested that these latter words validly confer an appellate jurisdiction in such cases till the jurisdiction is expressly taken away. I attach no weight to the word "*now*," as it seems to me purely descriptive, having reference to the jurisdiction to be exercised

at the moment when the new Letters Patent were published. I presume that if any Act allowing appeals to the High Court had been repealed on the 1st January 1866, this Court could not have heard such appeals if presented after the publication of the Letters Patent, although the case had been subject to appeal by a law in force on the 28th of December 1865, the date which the Letters Patent bear. My opinion, therefore, is, that the power of this Court to hear appeals from the Civil Courts in the interior (inseparable from the rights of parties to prefer the appeals) is now regulated by Act VI of 1871.

In my opinion, however, we may safely adopt, and for the sake of obviating hardship and in justice we ought to adopt the construction which the High Court of Bombay has put on s. 6, Act I of 1868, in *Ratanchand Shruchand* v. *Hanmantrav Shivabakas* (1), and we ought also to hold that it will cover specific proceedings taken in execution of a decree which have been commenced before the Code came into force,—that is, before the repeal of Act VIII of 1859 became operative. By making this use of the 6th section of the General Clauses Act and by taking the view which I have taken of the effect of s. 3, it seems to me that all difficulty is avoided. The provisions of the Code will then have no retrospective effect so as to injure any right of action or right of appeal existing at the time when the Code came into effect; at the same time that the procedure as intended by the Legislature will come into force with all its incidents in every case at the time indicated,—that is to say, (1) the procedure in suits instituted after the Code came into force will be wholly subject to its provisions; (2) the procedure in suits commenced before it came into force and pending at that time will be regulated by the previous law up to decree, and by the Code after decree; and (3) the procedure after decree in suits determined before the Code came into force would thereafter be governed entirely by the Code as to new proceedings, but not as to proceedings already commenced, which, according to the view now suggested, are specially

1 6 Bom H C Rep., 166, 168.

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protected by Act I of 1868. With these indications of my own reasons, I concur in the proposed decision in the several appeals before us.

No. 323 OF 1877.

MARKBY, J. (MITTER J., concurring).—This was an application under s. 208 of Act VIII of 1859 by the purchaser of a decree to be allowed to execute the decree. The application was rejected by the District Judge on the 17th August 1877.

The appeal to this Court was presented on the 12th of November 1877, that is, after the new Code came into force.

No appeal will lie against this order under s. 588, which only applies to orders made under the new Code, which this order certainly was not.

If, therefore, the appeal lies under the new Code at all, it must lie as an appeal from an original decree under s. 540, which applies to decrees made under the old Code as well as to decrees made under the new.

The question, therefore, is, whether the order of the lower Court was a "decree" within the meaning of s. 540.

By s. 2 "a decree means the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied."

By "the result of the decision of the suit" we understand to be meant the order of the Court granting or refusing that, or some part of that which the suit was brought to obtain.

By "other judicial proceeding" we understand to be meant not the result of a judicial proceeding of any other kind whatsoever, but of a judicial proceeding which does not arise out of a suit such, for example, as proceedings other than suits to which by s. 647 the Procedure Code is made, as far as it can be, applicable.

No doubt, the words "any other judicial proceeding" are capable of receiving a wider construction. Almost every order of a Court of Justice embodies the result of a judicial proceeding; and an order made on appeal always does so. Moreover, in ordinary language, an order made on appeal is called a decree.

But in the definition itself, we have an indication that this was not the intention in the fact that "an order on appeal

remanding a suit for retrial" is declared to be not within the definition. This we take to be an example or illustration, not an exception. If the wider construction of the words "any other judicial proceedings" were intended by the Legislature, a remand would have come within the definition, because it cannot be denied that an order of that nature, though it does not embody the results of the decision of the *suit*, clearly embodies the result of the decision of the *appeal*. It declares that the result of the appeal is that the suit must be remanded for retrial.

Again, it is evident from a comparison of Chapters XLI and XLII with Chapter XLIII that the Legislature intended in the last-mentioned chapter to provide for appeals against "orders" which are not "decrees." But many of these "orders" would be "decrees" if we were to adopt the wider construction of the words "any other judicial proceedings" as mentioned above. Because, under this wider construction, an execution-proceeding, or a proceeding taken under s. 258 to compel a decree-holder to certify, or under ss. 311 and 312 to set aside a sale, or in an insolvency matter under ss. 351, 352, 353, or 357, or proceedings under Chapters XXXIV and XXXV, would be included within the words "any other judicial proceedings;" and orders referred to in clauses (*j*), (*k*), (*m*), (*n*), and (*r*) of s. 588 would be "decrees" within the definition of that word as given in s. 2 of the Act. But a comparison of the chapters mentioned above clearly shows that that was not the intention of the Legislature.

Furthermore, if we were to adopt the wider construction of the words "other judicial proceeding" in s. 2, we should have to give the same construction to the words "proceedings other than suits and appeals" in s. 647 of the Code. In this view of s. 647, the provisions of ss. 649 and 650 would be wholly unnecessary, for the matter dealt with by the last two sections would have then been already provided for by s. 647.

These are some of the considerations which lead us to adopt the construction of the words "any other judicial proceeding" which we have adopted.

The appeal in this case, therefore, does not lie either under s. 540 or s. 588 of Act X of 1877, and there is no provision

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in any other Act, of which we are aware, under which it can be brought. There is no provision of Act VIII of 1859, or of Act XXIII of 1861, applicable to such a case. Section 11 of Act XXIII of 1861 comes nearest to it, but it has been frequently held that this section does not apply to a proceeding under s. 208 of Act VIII of 1859. Nor can the appeal lie under cl. 16 of the Letters Patent of 1865. That clause only empowers this Court to hear appeals in such cases as were subject to appeal to the High Court by virtue of any laws or regulations then in force. But this only throws us back again upon the old law, which, as we have said, does not provide for an appeal in such cases as this.

In our opinion, therefore, no appeal lies in this case.

No. 360 OF 1877.

This was an application to execute a decree for possession of land and costs. The Subordinate Judge, on the 17th March 1877, held that the execution was barred by limitation, and rejected the application. The District Judge, on the 23rd August 1877, held that the execution was not barred, and ordered execution to issue.

On the 19th November 1877, the judgment-debtor presented an appeal to this Court.

For reasons already stated, no appeal can lie against the order of the lower Appellate Court either under s. 588 of the new Code or under s. 584.

There was, however, a right of appeal to this Court against the order of the lower Appellate Court at the time when that order was made under Act XXIII of 1861, s. 11, which had not then been repealed; and though this Act was repealed when this appeal was presented, and though there is no provision in the new Code under which an appeal can lie in this case, there is still nothing in the new Code which expressly prohibits such an appeal. The prohibitory words in the first and last clauses of s. 588 do not apply to the order of the lower Appellate Court in this case, inasmuch as that order was made before the new Code came into force; and those prohibitions are not retrospective.

If the appeal in this case is taken away at all, it is taken away by the repeal of Act XXIII of 1861, which formerly gave an appeal in this case. But we think that, notwithstanding the repeal of Act XXIII of 1861, this Court is empowered to hear, and ought to hear, this appeal under the provisions of cl. 16 of the Letters Patent of 1865.

That section provides that this Court "shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to the appeal to the said High Court by virtue of any laws or regulations now in force."

We think this clause is in itself a sufficient authority to this Court to hear this appeal. It is not probable that the Legislature intended to take away a right of appeal which existed, though it had not been exercised, when Act X of 1877 was passed. Had they intended this, they would, we think, have used express words for the purpose.

No doubt, the Supreme Legislature has power under s. 9 of the 24 and 25 Vict., c. 104, to take away from this Court the powers conferred by cl. 16 of the Letters Patent; and by s. 588 of the new Code it has taken away a large portion of those powers, but, in our opinion, not in this instance.

It is said that cl. 16 of the Letters Patent only gives the power to hear appeals, whereas Act XXIII of 1861, which gives the right of appeal, is repealed, and that, therefore, the appeal no longer lies.

With great deference, it seems to us that so long as the power to hear the appeal remains, that is sufficient; and that the power of a Court to hear an appeal carries with it, as a necessary consequence, the right to an appellant to present to that Court a petition of appeal.

If, as very often happens, the power to hear the appeal and the right of appeal is given by one and the same provision, then the repeal of that provision would destroy the appeal altogether; but here there are two wholly independent provisions, one of which is untouched, and which is alone sufficient to enable us to hear this appeal.

We think, therefore, that this appeal should be heard.

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No. 2 OF 1878.

This was an application to execute a decree by which it was ordered that the judgment-debtor should execute a lease. The judgment-debtor objected that she ought not to be made to execute the lease, and that execution of the decree was barred by limitation. The Subordinate Judge, on the 15th September 1877, overruled these objections and ordered the lease to be executed.

An appeal to this Court was presented on the 2nd January 1878.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal lies to this Court against that order under Act X of 1877. But as the law stood when the order of the lower Appellate Court was made, an appeal against it lay to this Court under Act XXIII of 1861, s. 11. In our opinion this Court is still empowered to hear this appeal under cl. 16 of the Letters Patent of 1865. We have given our reasons for this conclusion in the case No. 360 of 1877. That reasoning is applicable to this case; and we think this appeal ought to be heard.

No. 26 OF 1878.

In this case the decree-holder had obtained a decree for rent; the decree-holder desire to attach the moveable property of the judgment-debtor. The judgment-debtor insisted that the decree-holder was bound first to execute the decree against the tenure. The Munsif thought the decree-holder was bound to take that course, and on 17th March 1877 refused to execute the decree against the moveable property of the judgment-debtor. The decree-holder, on the 6th of April 1877, appealed to the District Judge, who, on the 5th October 1877, set aside the Munsif's order, and ordered execution against the moveable property to issue. On the 4th January 1878, the judgment-debtor presented a petition of appeal to this Court.

For reasons already stated in Miscellaneous Regular Appeal No. 323 of 1877, no appeal can lie to this Court in this case under Act X of 1877.

It, however, remains to consider whether, although no appeal lies against the order of the lower Appellate Court under the

new Code, the right of appeal, which undoubtedly existed before the new Code came into operation, has been thereby taken away.

The appeal was given by Act XXIII of 1861, s. 11, and there are only two modes by which the appeal so given can have been taken away,—(1) by the repeal of that Act; (2) by the prohibitory words of the first and last clauses of s. 588.

Act XXIII of 1861 is repealed by the new Code, s. 3, with the proviso that "nothing herein contained shall affect the procedure prior to decree in any suit instituted or appeal presented before this Code comes into force."

Act I of 1868, s. 6, also provides, "the repeal of any Statute, Act or Regulation shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the Repealing Act shall have come into operation."

The repeal, therefore, of Act XXIII of 1861 is subject to these two provisos.

The proceeding before the lower Appellate Court,—that is, the appeal of the decree-holder from the decision of the Munsif, was commenced by the petition of appeal, dated the 6th April 1877. It was, therefore, commenced before the Repealing Act came into operation. It appears to us, therefore, that, in consequence of the second of the above provisos, the repeal of Act XXIII of 1861 does not "affect" that proceeding.

This being so, there was, at any rate, so far no difficulty in the way of the lower Appellate Court making its order on October 5th under the old Code, for though that Code was then repealed, yet, for the purposes of the appeal then pending for decision before the lower Appellate Court, the old Code still remained in force.

The question, however, still remains whether the order of the lower Appellate Court ought to be considered as, in fact, made under Act XIII of 1861, or under the new Code. This must be determined in order to see whether or no the case falls within the prohibitions contained in the first and last clauses of s. 588.

On the whole there is, we think, nothing in Act X of 1877 which compels us to say that the order of the lower Appellate

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Court was made under the new Code; and as for the purposes of the appeal in the lower Appellate Court, Act XXIII of 1861 was in force, we think that the order of the lower Appellate Court ought to be considered as, in fact, made under that Act, and not under the new Code.

The prohibitory words, therefore, of s. 588 do not apply to this case.

If these prohibitory words do not apply, then, as already shown in Miscellaneous Special Appeal No. 360 of 1877, this Court is empowered to hear this appeal under cl. 16 of the Letters Patent of 1865; and we think, therefore, that this appeal ought to be heard.

The remaining four cases all stand upon the same grounds, as will appear from the following statement of facts.

No. 27 OF 1878.

In this case certain persons presented a petition to a Munsif under s. 119 of Act VIII of 1859, alleging that there had been an *ex-parte* decree against them, and praying that this decree should be set aside and the suit heard. The Munsif, on the 19th June 1877, rejected the application.

The petitioners appealed, and the Officiating District Judge, on the 27th September 1877, rejected the appeal.

The petitioners then, on the 31st January 1878, presented a second appeal to this Court.

An appeal against the order of the lower Appellate Court lay to this Court under ss. 119 and 372 of the former Code of Procedure.

No. 30 OF 1878.

In this case a decree-holder applied for execution of a decree obtained *ex-parte*. The judgment-debtor then put in an application under s. 119, praying that the judgment should be set aside and the case heard. On this he was summoned by the Subordinate Judge to appear personally. He did not attend, and having given no evidence in support of his application, it was dismissed on the 15th March 1876. The judgment-debtor, on the 26th April 1876, appealed, and on the 3rd October 1877 the Officiating District Judge dismissed the appeal.

On the 31st January 1878 the judgment-debtor presented a second appeal to this Court.

This appeal would lie under the provisions of ss. 119 and 372 of Act VIII of 1859.

No. 33 OF 1878.

The decree-holder in this case had obtained a decree for possession, mesne profits, and costs. He applied for execution, and the Subordinate Judge, on the 5th August 1876, ordered that he should recover mesne profits from Sraban 1269 to the end of 1280; and certain costs, which were specified.

The judgment-debtor, on the 10th August 1877, appealed to the District Judge, complaining against the order of the Subordinate Judge, both as to mesne profits and costs. The District Judge, on the 30th November 1877, dismissed the appeal.

On the 31st January 1878 the judgment-debtor appealed to this Court.

This appeal would lie under the provisions of s. 11 of Act XXIII of 1861.

No. 48 OF 1878.

In this case the decree-holder had obtained a rent-decree for money on the 16th September 1871. On the 18th July 1876 he applied for execution. The Subordinate Judge, on the 14th December 1876, held that execution was barred by s. 58 of Act VIII of 1869, B.C. On the 13th January 1877, the execution-creditor appealed to the District Judge, who, on the 15th December 1877, reversed the order of the Subordinate Judge and ordered execution to issue.

The judgment-debtor, on the 25th February 1878, presented a petition of appeal to this Court.

This appeal would lie under s. 11 of Act XXIII of 1861.

The question in all these last four cases is precisely the same, —namely, whether the provisions under which these appeals were formerly given being repealed, the appeals will lie now, the repeal of those provisions notwithstanding.

For the reasons stated in Miscellaneous Special Appeal No. 360 of 1877, and Miscellaneous Special Appeal No. 26 of 1878, we

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RUNJIT SINGH v. MEHERBAN KORE AND OTHER CASES.

think this Court is still empowered to hear these appeals, and that, therefore, these appeals ought to be heard.

In dealing with these appeals we have not given to s. 6 of Act I of 1868 so wide an application as the Chief Justice and one other of the learned Judges are disposed to do. It seems to us that difficulties may arise if we give that section too wide an operation. We prefer, therefore, to admit these appeals on another ground upon which they seem to us admissible, reserving, for the present, the consideration of the exact limits of application of s. 6 of Act I of 1868 to the new Code of Procedure.

AINSLIE, J.—I concur with my learned brothers, Markby and Mitter, JJ., in thinking that, in all cases in which an appeal lay under Act VIII of 1859, the right of appeal is saved by the 16th clause of the Letters Patent.

This disposes of all the appeals before us excepting No. 323. The order in this case was made under s. 208, Act VIII of 1859, and was not open to appeal. The matter dealt with by the order is now governed by s. 232 of the present Code. Reading s. 588, cl. (*j*), with cl. (*p*), an order made under s. 232, if in favour of the assignee of a decree, is appealable as an order; but s. 588 only applies to orders made under the Code, and s. 591 bars any appeal from an order not provided for by s. 588.

I, therefore, concur in rejecting appeal No. 323, and in admitting all the others before us.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Markby and Mr. Justice Birch.

1878 *Feby.* 16.

J. WILLIAMS (PETITIONER) *v.* WILLIAMS (RESPONDENT) AND CONRAN (CO-RESPONDENT).*

Divorce Act (Act IV of 1869), s. 14—Delay—Connivance—Rebuttal of Presumption.

Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the Court looks to when the charge of adultery preferred, is, whether there has been such delay

* Reference in Divorce Suit, No. 1 of 1877, from an order of J. F. Browne, Esq., Offg. Judge of Zilla Patna, dated the 22nd June 1877.

as to lead to the conclusion that the petitioner had either connived at the adultery, or was wholly indifferent to it; but any presumption arising from apparent delay may always be rebutted by an explanation of the circumstances.

THE facts of this case, so far as they are material, appear from the judgment of the Court.

GARTH, C.J.—In this case the petitioner, John Alexander Vincent Williams, sues for a divorce from his wife, Grace Evelina Williams, on the ground of her adultery with the co-respondent, Robert Conran; and he also claims damages against the co-respondent. The District Judge has granted a decree *nisi* for the dissolution of the marriage with Rs. 3,000 damages against the co-respondent, and this decree is now before us for our confirmation.

It appears that the parties were married in the year 1858 at Benares. They had several children, but only one survived. In the year 1863 they were living together at Allahabad in the police barracks, where the co-respondent, who is a single man, also resided, the petitioner and the co-respondent being both at that time Police officers. The co-respondent was on intimate terms with the petitioner and his wife; but there is no reason to suppose that the petitioner had at that time discovered anything which could give him cause for suspicion.

In the year 1864 or 1865 the petitioner and his wife went to reside at Benares, and in the year 1866 Mrs. Williams became so ill that her life was despaired of. She then expressed a wish to see the co-respondent. She said that she thought she was going to die, and that she wished to make over her only child to him. The petitioner, accordingly, sent for the co-respondent, but it does not appear that the child was actually made over. The co-respondent stayed for a few days, and then went to Allahabad. A week afterwards the co-respondent returned to the house, having been sent for again by the respondent's sister at the respondent's request.

About a month afterwards the petitioner was transferred from Benares to Cawnpore. The respondent was then recovering, and the petitioner states that it was then arranged that he

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should furnish a house at Cawnpore, and remove the respondent thither when she was stronger. The petitioner says that whilst he was getting the house ready, he got a letter from his wife, saying that he was to consider her as dead, and that she would not join him. This letter is not produced, nor is the date of it given. The only attempt which the petitioner then made to find his wife was by writing letters, but he does not say to whom he wrote, nor does he give any particulars as to the information he received except with reference to a letter which he says he wrote to Mr. Conran fifteen or twenty days after the respondent had expressed her intention not to join him. His account of this correspondence is as follows:

"I wrote to Mr. Conran about fifteen or twenty days after my wife told me by letter that she would not join me. I wrote to ask him whether he had ever seen her in the course of his duties at the different stations on the line. He evaded a direct answer, and sent me an impertinent answer to the effect that my wife's grandmother, Mrs. McKinnon, had told him that I did not approve of his proceedings with my sister-in-law, and under such circumstances I should not ask him for information. I answered the letter, and he then wrote to me to say that he did not wish to hear from me again, as I did not entertain a high opinion of his morality." None of these letters are produced. He further says that he heard from his wife in 1868, when she complained that her own relations had charged her with unchastity. He does not produce this letter, nor does he say where it was posted. But he says that he wrote to her relations stating that these imputations were unfounded. He does not say so explicitly, but he evidently desires it to be understood that this is all that he heard of his wife between 1866, when she left him, and February 1877, when by a mere accident he was informed by a person at Benares that his wife was then at Burdwan with Mr. Conran. He says that a few days after receiving this information, when on his way through Dinapore, he saw the co-respondent on the railway platform. He says that he did not speak to him, because he had written to him long before and had received what he calls the rude answer above mentioned. He says that he then employed a Mr. Smith

residing at Dinapore to make enquiries, and Mr. Smith ascertained that the respondent was living with the co-respondent at Dinapore. Thereupon the petitioner came down himself to Dinapore, and having disguised himself as a native, went to the house and had an interview with his wife. Subsequently, Mr. Smith sent for Mr. Conran to the dák-bungalow, and he then admitted the adultery. Immediately afterwards these proceedings were instituted.

The petitioner's account of himself since 1868 is not very definite. He says that he left the police in 1872, and was then employed as manager of an estate in Oudh for about thirteen months at a salary of Rs. 200 a month. He then got the command of the troops of the Rajah of Benares at the same salary. This post he held about nine months, and since that time he has been acting as agent for a Mrs. Kawty at Assensole and elsewhere, and also carrying on a general business, apparently on his own account, at Dinapore. He does not say where he has resided. He says that he does not know where his child is, but he has heard that he is at a school in Darjeeling.

We have no exact information where the respondent has resided since she left her husband, but it is proved that in May 1875 a child was baptized at Dinapore as being the daughter of Richard Harper and Grace Evelina Conran, therein described as living at Khagoul. Khagoul is a suburb of Dinapore, and is in fact the railway station which usually passes under the name of Dinapore. The co-respondent has apparently been all along, and still is, in the police. The petitioner swears that he had no suspicion even against his wife until he received the information in February that she was at Burdwan with the co-respondent.

Neither respondent nor co-respondent have appeared in this suit.

The Judge considers the petitioner's story, though a remarkable one, as implicitly true in every respect, and sufficient to show there was no connivance, collusion, or unusual delay.

We cannot accept this view of the matter.

It has been a long, established principle that, whilst on the one hand there is no absolute limitation in the case for a

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petition of dissolution, yet that the first thing which the Court looks to when the charge of adultery is preferred, is, whether there has been such delay as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it; but any presumption arising from apparent delay may always be removed by an explanation of the circumstances. That principle is recognised in s. 14 of the Act.

Now the way in which the petitioner meets the question of delay in this case is as follows. He wishes it to be believed that he never suspected the chastity of his wife at all from the time she left him in 1866 until the accidental discovery in February of last year. He also would have it inferred that he was wholly ignorant of where his wife was residing during those eleven years, and that he commenced these proceedings as soon as he discovered the truth. Upon the evidence given in this case, this appears to us to be wholly incredible. After his wife's strange conduct in sending twice for Mr. Conran when she supposed herself to be dying, and expressing a desire to hand over her child to him, it seems incredible that when a month afterwards she declared her intention to leave her husband, he should not have even suspected Mr. Conran; and this is all the more strange when we consider the petitioner's account of the correspondence which took place between himself and Mr. Conran, which alone was quite sufficient to have aroused the suspicion of any ordinary man. At least it was to be expected that, on receiving his wife's letter, the petitioner would have as once come down from Cawnpore to Benares, and have had an interview with his wife, if, as he says, he was really then desirous that she should return to him, and considering her condition, and the facilities which he as a police officer would have for making enquiries, there cannot be the least doubt that he could then have easily found her, if he had been so minded; still less is it credible that during all these years the petitioner has never been able to find any clue to where his wife was residing, or that he has never had any suspicion that she was residing with Mr. Conran. She had never gone to any great distance, and has apparently been residing for a considerable time with Mr. Conran near to the railway station at Dinapore, where

these parties have been living openly as man and wife. The petitioner does not deny that he has been frequently at Dinapore, and as he carries on a business there, the reasonable inference is that he has been so. It is impossible that it can have escaped his knowledge that Mr. Conran was residing at Dinapore as a married man, and even if it did not come directly to his ears, that the person living at Dinapore as Mrs. Conran was the respondent, which is in itself very improbable; it is at any rate impossible to believe that he did not know where Mr. Conran was to be found, and yet knowing this, he did not make any attempt to obtain information from him as to the whereabouts either of his wife or his child.

Upon the whole, it seems to us impossible to escape the conclusion that the petitioner from the first knew perfectly well that his wife was living with Mr. Conran, and that knowing this, he forebore taking any steps to procure a divorce. This of itself would not disentitle the petitioner to a divorce if he were capable of explaining the delay; but when this delay not only remains unexplained, but the petitioner has attempted to get rid of the difficulty by deceiving the Court, it is impossible to avoid the conclusion that there are in this case, if the truth were known, some circumstances of connivance or insincerity which would disentitle the petitioner to the relief which he asks.

Had the petitioner stated the true facts of the case, it is quite possible that we should not have considered the delay to be a bar to the granting of the decree; but the true facts having been concealed from us, we are not in a position to give the petitioner the relief which he asks. We, therefore, refuse to confirm the decree for the dissolution made by the District Judge, and we direct that the petition be dismissed.

Petition dismissed.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
March 21.

SUDDURTONNESSA AND ANOTHER (PLAINTIFFS) *v.* MAJADA KHATOON AND ANOTHER (DEFENDANTS).*

Mahomedan Family adopting Hindu Customs—Law applicable to—Discretion of Judge.

A Mahomedan family may adopt the customs of Hindus subject to any modification of those customs which the members may consider desirable. A Judge is not bound, as a matter of law, to apply to a Mahomedan family living jointly all the rules and presumptions which have been held by the High Court to apply to a joint Hindu family. It rests with him to decide in any particular case how far he should apply those rules and presumptions.

THIS was a suit to recover possession of an eight gunda one kara and one krant share of a five-anna share of a certain talook. The plaintiff stated that while her husband and his co-sharers lived jointly, five annas share of the talook in dispute was purchased from joint funds; that the kobala was executed in the name of Golam Ali and Nazarut Ali; that all the co-sharers remained in possession by enjoying the profits thereof up to the year 1274; that, on their separation, the widows of Golam Ali and Nazarut Ali granted an ijara in respect of the entire five annas share to the defendant No. 10, and thereby dispossessed the plaintiff. The defendants pleaded, amongst other matters, that the disputed property was not purchased from joint funds, that Golam Ali and Nazarut Ali obtained it under a gift, and that they themselves and their heirs held possession thereof, and that the co-sharers separated in the year 1250. The lower Appellate Court did not apply the strict rules of Hindu law to the case, and dismissed the suit. From this decision the plaintiffs appealed.

Baboo *Doorga Mohun Dass* for the appellants.

Baboo *Taruck Nath Palit* and *Moulvie Serajul Islam* for the respondents.

* Special Appeal, No. 1073 of 1877, against the decree of Baboo Nobin Chunder Paul, Second Subordinate Judge of Zilla Dacca, dated the 7th February 1877, reversing the decree of Baboo Sree Nath Paul, Munsif of Manickgunge, dated the 4th April 1876.

MARKBY, J.—It is impossible to say that the judgment of the lower Appellate Court in this case was erroneous in law, unless we go to the length of saying that a Judge is bound, as a matter of law, to apply to a Mahomedan family living jointly all the rules and presumptions which have been held by this Court to apply to a joint Hindu family. Now we are not prepared to go to that length. When a Mahomedan family adopts the customs of Hindus, it may do so subject to any modification of those customs which the members may consider desirable; and it must rest with the Judge who has to decide each particular case how far he should apply the rules of a Hindu joint family to the case of any Mahomedan joint family that comes before him.

With regard to the case quoted—*Vellai Mira Ravuttan* v. *Mira Moidin Ravuttan* (1)—we have no reason to doubt that it was a perfectly proper decision with reference to the facts then before the Court. The Court does not there say anything contrary to what I have just now laid down as the law in this part of the country. Although in that particular case the Court, sitting as a Court of regular appeal, did apply to the acquisition of a manager on the part of a Mahomedan joint family the same presumption as applies to the manager of a Hindu joint family, they nowhere say that that must be done in all cases. We cannot say that because the Subordinate Judge does not apply that presumption to this case his judgment is erroneous in law. We cannot, therefore, interfere with his judgment in special appeal.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) 2 Mad. H. C. Rep., 414.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877 *May* 16, *and* 1878 *Jan.* 18.

PROSUNNO COOMAREE DEBEA AND ANOTHER (PLAINTIFFS) *v.* SHEIKH RUTTON BEPARY AND OTHERS (DEFENDANTS.)*

Landlord and Tenant—Erection of Buildings by Tenant-at-will or from year to year— Occupancy—Right of Landlord to determine Tenancy—Compensation—Act X of 1859, *s.* 6—*Duty of Judges of Lower Courts.*

There is no law in this country which converts a holding at will, from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, builds a dwelling-house upon the land demised.

The nature of a holding, as between landlord and tenant, must always be a matter of contract, either expressed or implied. If there is no express agreement, a tenant becomes a tenant-at-will or from year to year, and is liable to be ejected upon a reasonable notice to quit unless some local custom to the contrary is proved.

Adoito Churn Dey v. *Peter Dass* (1) followed.

THE plaintiffs in this suit sought to eject certain tenants from homestead lands on which was situate a house and some fruit-trees. They brought their suit upon a notice served on the defendants, in which they stated that they wanted the lands for the erection of a cutcherry, and claimed the right to re-enter on an agreement said to have been executed by the defendants' father. The defendants denied the agreement, and contended that they and their ancestors had held the lands in suit from a time previous to the Permanent Settlement, and therefore no suit in ejectment could lie. The written statement further stated that the defendants' father had raised earth upon the land and built the house now standing upon it. The Court of first instance rejected the agreement relied on by the plaintiffs as not genuine; it further held that the defendants had failed to prove occupation from before the Permanent

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Prinsep, dated 16th of May 1877, in Special Appeal No. 2467 of 1876, upholding the judgment of Baboo Bhoobun Chunder Mookerjee, Officiating or Subordinate Judge of Dacca.

(1) 13 B. L. R., 417; S. C., 17 W. R., 383.

Settlement, but found that the defendants had through their ancestors and themselves been in occupation for fifty or sixty years. The evidence in respect of the raising the earth and the erection of the house by the defendants' father was held not worthy of credit. The Court, however, further held that the lands not being in use for any agricultural or horticultural purpose, no right of occupancy could accrue, and the notice to quit having been duly proved, the plaintiffs, in the absence of any special contract whatever between the parties, were entitled in their general right as landlords to a decree. The lower Appellate Court reversed this decision on the ground that "by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or written lease."

The plaintiffs thereupon appealed to the High Court, the appeal coming on for hearing before a single Judge (PRINSEP, J.) The learned Judge was of opinion that the position of the plaintiffs in the suit could not be placed higher than that of a purchaser at a sale for arrears of Government revenue as prescribed by s. 37 of Act XI of 1859, and therefore, in the absence of any special right, the plaintiffs were not entitled to re-entry; further, that it being proved that the defendants or their ancestors had erected a dwelling-house and lived on the lands for fifty or sixty years, they had thereby acquired a tenancy which was *primâ facie* of a permanent character, and in support of this view referred to *Shib Das Bandopadhya* v. *Bama Dass Mookhopadhya* (1). The learned Judge also held that *Adoito Churn Dey* v. *Peter Dass* (2) was distinguishable from the facts in the present case, and for these reasons dismissed the appeal on the 16th May 1877.

A further appeal under s. 15 of the Letters Patent was accordingly preferred.

Baboo *Bussunt Coomar Bose* for the appellants.

The respondents were not represented.

(1) 8 B. L. R., 378. (2) 13 B. L. R., 417; S. C., 17 W. R., 383.

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The judgment of the Court was delivered by

GARTH, C.J.—In this case we are of opinion that the appeal should be decreed. (The learned Judge stated the facts of the case and continued.) So that we must take the established facts to be that the defendants, their father and grandfather, have been occupying this land for fifty or sixty years; that it has been used as a homestead, consisting of a house and fruit-trees; that there is no evidence as to the origin of the tenancy, nor (except as to the amount of rent) as to the terms of it; and that it does not appear who built the house or planted the fruit-trees. The notice to quit has been proved, and no objection has been taken that any longer notice to quit was required by law.

Upon these facts, the Munsiff has decreed in favour of the plaintiffs.

The Subordinate Judge has reversed that decision and has delivered a judgment which, in our opinion, is not only contrary to law, but which we cannot refrain from characterizing as being wilfully perverse and disrespectful to this Court.

He begins by saying that he is aware of numerous decisions of the High Court, in which it has been held that, as homestead tenants have no right of occupancy under s. 6 of the Rent Act, they are to be adjudged tenants-at-will and liable to ejectment at the landlord's pleasure.

He then, professing the utmost deference and veneration for this Court, proceeds to lay down the law and pronounce a judgment directly in opposition to the decisions to which he refers; and—without even condescending to examine those decisions, or attempting to distinguish them from the case with which he is dealing—takes upon himself to lay down the proposition broadly, that, "by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or a written lease," and professing to act upon this rule he reverses the Munsif's judgment and dismisses the plaintiffs' case.

Now it must be noted in the first place that here it is not found as a fact that either the defendants or their ancestors

built the house which stands on the land in question. The Munsif negatived the defendants' statement in that respect, and the Subordinate Judge does not find it to be proved.

But apart from this consideration, there is no law, of which we are aware, in this country, which converts a holding-at-will, or from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, chooses to build a dwelling-house upon land demised.

Such a law, if it existed, would, in a large number of cases, lead to great injustice and inconvenience, and would often leave landowners entirely at the mercy of their ryots. Small kutcha dwellings in this country may be erected in a short time and at a very trifling expense; and if a landlord, as soon as he or his agent discovers such a dwelling to have been erected, were obliged on the one hand to turn the tenant out, or make him pull down his house; or, on the other hand, as the only alternative, to allow the tenants permissive holding to become a permanent tenure, the consequences would often be disastrous to tenants, or very unjust to landlords.

The truth is, that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement, and pays rent, he becomes a tenant-at-will, or from year to year; or, in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by local custom; and in such a case, he is, of course, liable to be ejected by a reasonable notice to quit

Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy; but the existence of the custom in such cases must be a matter of proof, and no Judge has a right to act upon such customs unless their existence is duly established.

In this case no such custom is even suggested, and as there was no express agreement of tenancy and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit.

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The Subordinate Judge has cited several texts from Menu and Vrihaspati, which appear to us have nothing to do with the question. They apply to cases of *forcible* and *criminal* trespass and dispossession, and do not profess to regulate the ordinary relations between landlord and tenant, or to deal with cases of dispossession by legal process.

What the Subordinate Judge says with regard to the statutory law of this country is also beside the question. The Legislature has, undoubtedly, in several instances, protected from sale or confiscation lands held under *bonâ fide* leases at fair rents for building purposes, continuing to be used for those purposes. But these enactments have nothing to do with the present case, in which, as far as we can see, no building agreement of any kind was ever made between the parties.

The truth is, that if a tenant wishes to build dwelling-houses upon his land, he should take care to make a proper arrangement accordingly with his landlord. He has no right to hire his land for one purpose, upon an ordinary permissive holding from year to year, or at will, and then, by using it for another purpose, to convert it, at his own option and without consulting his landlord's wishes, into a permanent tenure. Such a law, if it were in force, would be manifestly unjust to the landlord, and would lead to much litigation and inconvenience.

The case of *Adoito Churn Dey* v. *Peter Dass* (1), decided by L. S. Jackson, and Glover, JJ., is in its circumstances very similar to the present, except that in that case it was proved (which it has not been here), that the defendant had built a kutcha-pucka wall upon the land of the value of Rs. 500, and that the defendant's father and grandfather had occupied the disputed land by raising houses upon it for upwards of two generations, embracing a period of thirty or thirty-two years. Nothing is said in that case as to the defendant or his predecessors having paid any rent; but we must assume that they did so, otherwise they would have acquired an independent title by adverse possession.

In other respects the tenancy was an ordinary one, as it is here, for no fixed period, and in the absence of proof to the

(1) 13 B. L. R., 417; S. C., 17 W. R., 383.

contrary, it was held to be permissive, that is, as we understand it, at will, or from year to year.

Under these circumstances, it was held by the learned Judges that the defendants were liable to be ejected in the ordinary way, and that the fact of their having built the wall, and of their ancestors having erected the houses, placed them in no better position than they would have been under their original holding. See also to the same effect the cases of *Kylash Chunder Sircar* v. *Woomanund Roy* (1) and *Ramhhun Khan* v. *Haradhun Paramanik* (2).

In some instances, no doubt, either from expressions used in the contract of tenancy, or from the fact of land having been let by a landlord expressly for the purpose of the tenant building pucka houses upon it, such circumstances, coupled with a long and uninterrupted possession by the original grantee and his defendants, have been held to raise a presumption that the tenure was intended to be permanent; but such cases often create doubt and difficulty, and it is always far safer for a tenant, if he means to build, to have the terms of his tenure clearly defined by a written instrument.

Had the Subordinate Judge properly considered the facts of this case, and treated with due deference the decision of this Court, to which he has himself referred, he would not have fallen into error. Unless the subordinate judiciary in this country will loyally defer to the opinion of the High Court, and submit their own views and prejudices to the High Court's judgment, it is quite impossible that uniformity in the law, which is one of the highest objects to be attained in the administration of justice, can ever be arrived at.

As regards the decision of the learned Judge of this Court, which is now under appeal, we are quite unable to appreciate the grounds upon which he has attempted to distinguish the facts of this case from those of the authorities to which he has referred. In those cases, as in this, there was no evidence that the tenant held for any particular time. He held at a rent in the ordinary way, and did not give any evidence to show that his holding was of a permanent character, or for any defined period.

(1) 24 W R., 412. (2) 1 B. L. R., 107.

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Under these circumstances, his tenancy was considered to be at will, or from year to year; or in other words, permissive at his landlord's pleasure. We consider that the case of *Adoito Churn Dey* v. *Peter Dass* (1) is wholly undistinguishable from the present.

The judgments of both Appellate Courts are reversed, and the judgment of the Munsif restored with costs in each Court.

Before Mr. Justice Kemp and Mr. Justice Morris.

1878 *Feby.* 5.

MAHOMED ARSHAD CHOWDHRY (DEFENDANT) *v.* SAJIDA BANOO (PLAINTIFF).*

Mahomedan Law—Widow's Rights—Return.

By the Mahomedan law of inheritance, in default of other sharers and in the absence of distant kindred, the widow is entitled to the 'return,' to the exclusion of the fisc.

THIS was a suit brought by the widow of one Nawab Ali Chowdhry for recovery of possession of certain lands, part of the estate of her husband, who died on the 21st of July 1867. The plaintiff claimed as sole surviving heir of the deceased. In the written statement, the defendant represented himself as a "cousin in the collateral line" to the said Nawab Ali Chowdhry, and among other defences denied the right of the plaintiff to more than a fourth share of her husband's estate. The parties to this suit were of the Suni sect of Mahomedans. The Court of first instance found on the facts that the defendant was not of the same family with Nawab Ali Chowdhry, and that, in the absence of any other heir, the plaintiff was entitled to all the properties left by her husband, the said Nawab Ali Chowdhry. The defendant appealed to the High Court.

Mr. *H. Bell* (with him Moulvi *Serajul Islam* and Moulvi *Mahomed Yousuff*) for the appellant.

* Regular Appeal, No. 249 of 1876, against the decree of Ram Coomar Pal Chowdhry, Roy Bahadoor, Subordinate Judge of Zilla Sylhet, dated the 25th of May 1876.

(1) 13 B. L. R., 417; S. C, 17 W. R., 383.

Mr. *C. Gregory* and Baboo *Joy Gobind Shome* for the respondent.

Mr. *H. Bell.*—The plaintiff's claim is inadmissible under Mahomedan law. At most she is entitled to no more than a fourth share of her husband's estate. She cannot share in what is technically called the 'return'—*Mussamut Hurmut-ool-Nissa* v. *Allahdia Khan* (1). Where the sharers do not exhaust the property, the surplus goes to the residuaries connected by 'nasab' or consanguinity with the deceased. Between wife and husband there is no '*nasab*;' see Baillie's Mahomedan law of Inheritance, pp. 10, 13, 44, 77, and 79; see also Rumsey's Chart of Mahomedan Inheritance, p. 27. Later commentators assent to the doctrine that the widow may obtain a share in the return, see Shama Churn's Tagore Law Lectures (1873), pp. 91, 95, 232, and 233; but only on the ground of irregularity or insecurity in the public treasury; it was thought that the property should go by preference to the Mahomedan wife rather than to an alien Government. But the widow, unless the heir, could not resist the right of the Crown. The Crown takes not under Mahomedan law, but by virtue of its prerogative—*Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (2), *Advocate-General* v. *Ranee Surnomoye Dossee* (3). The defendant is in possession. Except on proof of title by the widow, she has no right except as to a four-anna share; the remaining twelve-anna share has escheated to the Crown. The possession by the defendant holds against all claimants except the Crown.

Mr. *C. Gregory* for the respondent.—In this case there are no residuaries, and except the widow no sharers. The authorities already quoted show that the widow is entitled to the return; the point was so decided in *Mussamut Soobhanee* v. *Bhetun* (4).

Mr. *Bell* in reply.

Cur. ad. vult.

KEMP, J. (MORRIS, J. concurring) (after disposing of questions not material to this report, proceeded as follows):—It is

(1) 17 W. R., 108.
(2) 8 Moo. I. A., 500, 520.
(3) 9 Moo. I. A., 387, 405.
(4) 1 Sel. Rep., S. D. A., 346.

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admitted by the defendant that the plaintiff, as widow of the late Nawab Ali Chowdhry, is entitled to a four-anna share; but it was at first alleged by him in his written statement that she was in possession of that four-anna share. That contention was subsequently abandoned in the course of the argument by the learned Counsel who appears for the appellant, and it is clear that the plaintiff has been dispossessed even of the share to which she is by the admission of the defendant entitled under the Mahomedan law. That brings us to the question raised in this case as to whether the plaintiff is entitled to succeed to anything beyond a four-anna share in the estate of her late husband Nawab Ali Chowdhry. The learned Counsel for the appellant quoted a Privy Council decision in the case of *Mussamut Hurmut-ool-Nissa Begum* v. *Allahdia Khan* (1); Hajee Hedayut; Baillie's Mahomedan Law, 2nd edition, pp. 10, 11, 44, 77, 79; Macnaghten's Mahomedan Law, p. 93; and also a passage at p. 651 of the Futwa Alumghiri. In the Privy Council decision quoted by the learned Counsel, their Lordships observe that "the proposition which assumes that if there are no residuaries the three-fourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in the return; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc." Now these observations, although they had no bearing upon the ultimate decision of the case, seem to us rather in favour of the plaintiff than of the defendant. Then with reference to the quotations from Baillie's and Macnaghten's Mahomedan Law and from the Futwa Alumghiri, there can be no doubt that the more ancient authorities did hold that the widow and the husband were not entitled to the "rudd," or return, under the Mahomedan law; but more modern authorities have held the other way, and have ruled that in the absence of the "bait-ul-mal," the widow and husband are entitled to the return. The other side have quoted a decision of the Sudder Dewany Adawlut in the case of *Mussamut Soobhanee* v. *Bhetun* alias *Shah Azim Ali* (2), before Harring-

(1) 17 W. R., 108.

(2) 1 Sel. Rep., S. D A, 346.

ton and Stuart, Judges of the Sudder Dewany Adawlut. In that case, which is precisely on all fours with this case, the futwa of the moulvis was taken, and it was to this effect that the widow was entitled to the return under the Mahomedan law. The authorities cited by the moulvis in support of their futwa are mentioned in a note appended to that case by Sir William Macnaghten. These authorities are the Hemadya, which is a work of considerable authority (see page 341 of Morley's Digest), and the Zukheorali. The modern authorities as to the widow being entitled to the return under the Mahomedan law are set out at p. 233 of Shama Churn's Lectures on Mahomedan law.

We therefore, think that the weight of authority is in favour of the plaintiff's contention. She, as widow of Nawab Ali Chowdhry, is entitled to the return to the exclusion of the defendant, who has failed to establish his title as kinsman under the Mahomedan law. We therefore, hold with the Subordinate Judge that the widow is entitled to the return.

Appeal allowed.

Before Mr. Justice Kemp and Mr. Justice Morris.

BEMOLASOONDURY CHOWDHRAIN AND OTHERS (PLAINTIFFS) *v.* PUNCHANUN CHOWDHRY AND OTHERS (DEFENDANTS).*

1878 *Feby.* 19.

Rights under partition (Butwara) Proceedings—Res Judicata—Explanation II, s. 13 *of Civil Procedure Code—Reg. XIX of* 1806.

A sued *B* to establish his rights of possession to certain lands allotted him under a butwara made in accordance with the provisions of Reg. XIX of 1806. In a previous suit by *B* instituted after the butwara against a tenant for arrears of rent due for a portion of the lands now in dispute, *A* intervened and was made a defendant on the sole ground that he was the person entitled to the rent, but failed to establish his claim. *Held*, following the Full Bench case of *Govind Chunder Koondoo* v. *Taruck Chunder Bose* (1), that *A's* present suit was barred by the judgment in the former suit.

* Regular Appeal, No. 238 of 1876, against the decree of Baboo Nundo Coomar Bose, Second Subordinate Judge of Zilla Rajshahye, dated the 27th May 1876.

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BEMOLA-SOONDURY CHOWDHRAIN v. PUNCHANUN CHOWDHRY.

THIS was a suit for possession on the basis of zemindari title to a half share in certain villages in Parganna Sonabaju. On the 21st of November 1852, the plaintiff, together with other shareholders, purchased certain property, including the lands now in dispute, at a sale for arrears of Government revenue. In the butwara carried out under the provisions of Reg. XIX of 1806, these lands fell within the share allotted to the plaintiffs, and on the 15th of September 1872 formal possession was given to them by proclamation of the amin. In attempting to take actual possession of the lands, the plaintiffs were opposed by the defendants; and on the 5th of October 1872 the Magistrate of the district, in a proceeding held under s. 318 of the Code of Criminal Procedure, directed the defendants to be retained in possession till ousted by due course of law. Some time in the year 1874 the defendants instituted a suit against one Komal Ghose, a tenant of a portion of the lands in dispute for arrears of rent; whereupon the husband of the present plaintiff obtained permission, and was made a party to this suit, on the allegation that he was the rightful landlord; but he put forward no claim to the property based on the butwara proceedings. The Munsiff gave the then plaintiff a decree, which was upheld on appeal by the lower Appellate Court on the 29th January 1875, on the ground that the present defendant had established a right to, and was in possession of, the lands in dispute. The plaintiffs filed the present suit on the 16th September 1875 in the Court of the Subordinate Judge of Rajshahye, who, on the 27th May 1876, dismissed it, holding on the facts that the defendant was the owner and entitled to possession.

Saroda Gobind Chowdhry, the husband of the plaintiff, died pending the suit, and Bemolasoondury Chowdhrain was put on the record as his representative. She now preferred this appeal to the High Court.

Baboo *Srinath Das* and *Gooroo Das Banerjee* for the appellants.

Baboo *Mohini Mohun Roy* and Baboo *Ishur Chunder Chuckerbutty* for the respondents.

The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts of the case, continued):—In appeal before us the first ground taken that there is no such putnee talook as alleged by defendants has been virtually abandoned. Indeed, in the face of the evidence, it is clear that this talook was in existence prior to 1806, in which year Upendro Narayan Chowdhry, zemindar, assigned it by way of maintenance to his grandsons Permanand Chowdhry and Lukhi Chunder Chowdhry, ancestors of the present defendant No. 1. Its existence was also established by the decree in the suit of Saroda Gobind Chowdhry and others v. Komul Ghose. The second alleged ground of action is equally untenable, because any possession which may be given, or be said to be given, under the Butwara Law can have no force against third persons who were no parties to it.

By a butwara the rights of undertenure-holders are in on way affected, and though, as between shareholders, the assignment of specific lands to each shareholder has binding effect, yet such assignment does not of itself entitle the shareholder to obtain khas possession to the deprivation of the rights of the tenants on the land.

Another bar to the entertainment of this suit is the prior adjudication recognizing the title of the defendants in the suit of Saroda Gobind Chowdhry and others *v.* Komul Ghose. In that suit the plaintiff's chose to intervene, and the question of title as between them and the defendants was distinctly raised and determined. In the words of the judgment—"The plaintiffs have sufficiently proved by documentary and oral evidence that they have a right to, and are in possession of, an 8-anna share of turuf Ekdanta in virtue of a putnee talook." As, moreover, that suit was instituted two years after the conclusion of the butwara, any right to khas possession which the present plaintiffs considered themselves entitled to under the butwara should have been expressly set forth in that suit. They are, therefore, estopped under the ruling of the Full Bench in *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (1) from setting up this title

(1) I. L. R., 3 Calc., 145; S. C., 1 Cal. Rep., 35.

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BEMOLA-SOONDURY CHOW-DHRAIN v. PUNCHANUN CHOWDHRY.

now This principle is also recognized in the new Code of Civil Procedure, s 13, expl. II. On the merits, we think that the possession of the defendants cannot be disturbed. (The learned Judge then proceeded to examine the evidence and continued.) When, therefore, it is apparent that this talook has been known and recognized by the ancestors of the parties in the present suit, and that the defendants or their ancestors have been in continuous possession of the lands appertaining to their share for upwards of seventy years, we think that it does not lie in the power of the plaintiffs to disturb this existing possession. If the plaintiffs could truthfully assert that they knew nothing of the existence of this talook in the possession of the defendants, and accepted the lands assigned to them under the butwara, because they were under the impression that the assets were calculated upon the rental payable by the ryots, which rental they were to receive, this would be good ground for applying to the Board of Revenue to set aside the butwara. But there is no jurisdiction in the Civil Court to disturb a butwara which has been effected by the properly-constituted authorities acting in accordance with the law.

The suit was, therefore, rightly dismissed by the Subordinate Judge.

Accordingly we affirm the judgment of the Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr Justice Prinsep.

1878 *Mar* 14.

POGOSE (JUDGMENT-DEBTOR) *v.* CATCHICK AND ANOTHER (DECREE-HOLDERS).*

Charter Act (24 and 25 Vict., c 104), s. 15—Erroneous Order—No right of Appeal—Putting a Party on the Record who is not Legal Representative of a deceased Person.

Where a decree had been obtained against a British subject domiciled in India, who subsequently died intestate, and an order was made reviving the decree against one of his children, and ordering execution to proceed before

*Miscellaneous Regular Appeal, No 342 of 1877, against the order of Baboo Nuffur Chunder Bhutto, the Officiating Second Subordinate Judge of Zilla Backergunge, dated 23rd August 1877

letters of administration to his estate had been taken out, and without inquiry being made as to who were his legal personal representatives,—*held*, that, although no appeal lay against the order, yet that as it was clearly erroneous, and as, under the circumstances of the case, it must lead to the greatest confusion and injury to the interests of the parties, if the execution was proceeded with, the Court was justified in interfering under s. 15 of the Charter Act.

IN this case a decree had been obtained against one Peter Nicholas Pogose, a British subject domiciled in India. He subsequently died intestate. The lower Court, before letters of administration were granted to his estate, and without enquiry as to who were his legal personal representatives, revived the decree against the appellant, one of his children, and ordered execution to proceed.

Mr. *McNair* for the appellant.

Baboo *Bhooban Mohun Das* for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—In this case we think that the order of the Subordinate Judge, so far as it makes the present applicant, Mr. P. N. Pogose, a party to these execution proceedings, must be set aside.

The original judgment-debtor was dead. He was an Armenian, and, therefore, succession to his estate is governed by the Succession Act, and the only person who could be his representative is the person indicated by that Act. The only difficulty at all about the matter is whether there is an appeal against this order of the Subordinate Judge or not. Whatever our own opinion may be, however, it is better that in this particular case we should follow the decision of Mr. Justice Ainslie and Mr. Justice McDonell given in a somewhat similar case on the 28th August 1877, in which it was held that no appeal lies (1),

(1) See *Raggo* v. *Pogose*, Misc. Sp. Appeal, No. 104 of 1877 (Ainslie and McDonell, JJ.) in which the learned Judges held that s. 364 of Act VIII of 1859 prohibited an appeal from an order made on proceedings taken under s. 210 of the same Act. The rule applicable on such cases being analogous to that laid down in respect of s. 208 by the Privy Council in *Abidunnissa Khatoon* v. *Amirunnissa Khatoon*, I. L. R., 2 Calc., 327.

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and for the purposes of this case adopting that decision, we hold that no appeal lies in this case also. But nevertheless, although no appeal lies, we think it clearly a case in which we ought not to allow this erroneous order of the Subordinate Judge to stand. It is quite clear that it must lead to the greatest possible confusion and injury to the interest of the parties in this case, if this execution is proceeded with in the shape in which the proceedings now stand. Warning has already been addressed to the Subordinate Judge in the very judgment to which I have referred. Possibly, that judgment was not before him when he made the order now complained of. But it appears that there was before him another order of this Court in which it was distinctly pointed out that he had done entirely wrong in putting Mr. P. N. Pogose upon the record in defiance of the Succession Act. We are wholly at a loss to understand why the Subordinate Judge in spite of warnings of this Court insists on persevering in this course, and we think that on this occasion we are justified in interfering under s. 15 of the Charter Act. We do not intend to differ from what the Chief Justice said in the case, which was heard before himself and Mr. Justice Mitter (1). The Subordinate

(1) *The 10th Sept.* 1877.

Before Sir Richard Garth, Kt., Chief Justice, and Mr Justice Mitter.

IN THE MATTER OF P. N. POGOSE (PETITIONER) *v.* KHAJAH ASHANOOLAH (OPPOSITE PARTY).*

Mr. G. Gregory and Baboo *Chunder Madhub Ghose* for the petitioner.

Messrs. *Evans* and *Jackson* for the opposite party.

GARTH, C.J.—(MITTER, J., concurring.) We think that this rule should be discharged. It is an application uunder s. 15 of the High Courts Act to set aside an order made by the Subordinate Judge of Dacca admitting the applicant a defendant on the record as representing the deceased judgment-debtor, and ordering the sale of the property to proceed accordingly; and the ground upon which the rule was moved was that the Subordinate Judge had no jurisdiction to make that order.

The Subordinate Judge was, undoubtedly, wrong in making the order complained of, and the question which we have to decide is whether the order was merely an erronous decision, in a matter which it was for the Judge to determine, or whether it was a nullity as made by him without jurisdiction.

* Rule No. 952 of 1877, in the case of P. N. Pogose *v.* Khajah Ashanoollah.

Judge had no doubt jurisdiction to decide who was the legal representative of the deceased and, if he had decided that, we should not have thought it right, having regard to what has been said by the Chief Justice in his judgment, to interfere under s. 15. But he has not decided that question in this case. He could not venture to decide that Mr. P. N. Pogose was his father's representative in the face of the Chief Justice's judgment and the Succession Act. What he really does is this: He

The Judge was clearly not justified in placing the applicant on the record, and he ought to have known his duty better than to have made an order of this kind directly in the teeth of the provisions of the Succession Act, and without making any proper enquiry as to whether Mr. Pogose, who was put upon the record, was the legal representative of the deceased.

He was also very wrong in making an order of this kind on the very day that the sale was to take place. Such conduct was obviously calculated to induce the sale of the property at an inadequate price, and if we were satisfied that the order of the Subordinate Judge was made without jurisdiction, we should certainly have set aside the order and the sale which took place under it.

But it appears to us, having regard to the provisions of the Procedure Code, that the Subordinate Judge was the proper person to decide in point of fact as well as law, who was the proper representative of the deceased.

The person who was put upon the record was the deceased judgment-debtor's eldest son. He was summoned in the regular way, under s. 216, to show cause why he should not be made a party to the suit and why the decree should not be executed again him.

It appears that he came before the Court in obedience to that summons, and his objection there was not that he had not been duly made the legal representative of the deceased under the Succession Act, but that he had no longer anything to do with his father's property, which had been conveyed away to the Official Trustee for the benefit of the judgment-debtor's creditors.

Whether he took the proper point or not, the Subordinate Judge was very wrong in dealing w'th the matter as he did, but he was clearly, as it seems to us, the only proper person to decide the question before him. Suppose two persons, both claiming to have been made representatives of a deceased person under the Succession Act, had appeared before the Court, and that the only question was which of them was the legally-constitued representative. That question must have been determined by the Subordinate Judge. We are, therefore, of opinion that he has not acted without jurisdiction in deciding that the applicant was the proper person to be put upon the record, but he has been guilty of an error of law, which the present applicant might have rectified, if he had appealed within the time allowed him by law.

He has not chosen to take that course. He has allowed the time to go by: and now he asks this Court to put its extraordinary powers in force to assist him out of the difficulty.

This Court, under the circumstance has no power to help him, and the rule must be discharged with cosst.

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chooses to take upon himself to say that the proceedings pointed out by the law would be very inconvenient to the parties, and thinks that he would do some good to them by taking the course which he has taken. As I have already said, the result of taking that course must be disastrous to the parties, and we think we are fully justified in interfering in this case. The order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the legal representative of the deceased without enquiring whether he is so or not, is an order which cannot be allowed to stand. Properly there ought to have been a formal application under s. 15; but as there has been some difference of opinion between the Judges of this Court upon this matter, we think that we are justified in treating this case substantially as an application under s. 15, without putting the parties to further expense.

Dealing with this case under s. 15, we direct that the order of the Subordinate Judge putting Mr. P. N. Pogose upon the record as the representative of the deceased be set aside. We make no order as to costs.

Before Mr. Justice Ainslie and Mr. Justice Morris.

1877 *May* 8 & 1878 *Feb.* 6.

HURRISH CHUNDER ROY (JUDGMENT-DEBTOR) *v.* THE COLLECTOR OF JESSORE (DECREE-HOLDER). *

Under tenure—Arrears—Sale in Execution—Execution against other Property—(Beng.) Act VIII of 1869, *s.* 61.

A, a judgment-creditor, having obtained two decrees—one for money, the other for the rent of certain tenures—sold his debtor's right and interest in the tenures in execution of his money-decree, and afterwards in execution of his decree for rent again put up for sale the same tenures. At the second sale, *B* became the purchaser of whatever could pass under such sale. *A* subsequently sued and obtained a decree aaainst *B* for arrears of rent that

*Miscellaneous Special Appeal, No. 42 of 1877, against the order of H. B. Lawford, Esq., Judge of Zillah Jessore, dated the 31st of January 1877, affirming the order of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 6th of November 1876.

had come due in respect of the said tenure since the last supposed sale to him, and in execution of such last-mentioned decree again attached the tenures. On the intervention of third parties, the tenures were released from attachment. *A* having applied to levy execution on other immoveable properties of *B*, *held*, that the tenures having been released from attachment, *A* was not entitled, under s. 61 of Act VIII of 1869 (B.C.) to proceed against the other immoveable property of *B*, it being open to him to show by a regular suit that the tenures were liable to be sold in execution of his decree, and further, that upon the facts of the case he had disentitled himself to any equitable relief.

IN this case the plaintiff, the present decree-holder, obtained two decrees against one Behari Lall: the first an ordinary money-decree, the other a decree for the rent of certain tenures. In execution of the money-decree the plaintiff, on the 15th April 1869, sold his debtor's right and interest in the tenures, which ultimately passed into the hands of two persons, Keshub Nath and Omnath. On the 24th of the same month the plaintiff, after having extinguished the whole of Behari Lall's interest in the said tenures by the previous sale, proceeded again to sell the same tenures in execution of his decree for rent, and whatever may be supposed to have passed by such sale was purchased by the defendant, the present judgment-debtor. Subsequent to this sale the plaintiff brought his present suit against the defendant for arrears of rent since due on the same tenures, and in execution of the decree so obtained attached the tenures. Third parties intervening under s. 246 of Act VIII of 1859, the tenures were, on the 11th May 1873, released from attachment. The judgment-creditor then sought to levy execution on other immoveable properties of the judgment-debtor.

The lower Appellate Court affirming the order of the Court of first instance considered that, as he (the judgment-creditor) had done his best to get the tenures sold, but that the Subordinate Judge, by an apparently illegal order refusing their sale had released them from attachment, he was entitled to proceed against other immoveable property of the judgment-debtor.

The present appeal was accordingly preferred to the High Court. The case came on for argument on 8th May 1877.

Babu *Nulit Chunder Sen* for the appellant.

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HURRISH CHUNDER ROY v. THE COLLECTOR OF JESSORE.

Babu *Annoda Prosad Banerjee* for the respondent.

AINSLIE and MORRIS, JJ., reversed the order of the Courts below on the ground that the question had already been decided in a previous application to execute the decree which had been refused by the Judge of the 24-Pergunnahs on 11th March 1873, and that as no appeal had been preferred the question must be taken to have been finally determined.

Subsequently, but before judgment was signed, Babu Annoda Persaud Banerjee for the respondent, pointed out to the Court that the purport of the decree passed by the Judge of the 24-Pergunnahs on 11th March 1873 had been misunderstood.

The following judgments were accordingly delivered by—

AINSLIE, J.—A judgment in this case was delivered by us on the 8th of May last, but before it was signed it was objected by Babu Annoda Persaud Banerjee, for the respondent, that the Court had fallen into a mistake as to the purport of the decree made by the Judge of 24-Pergunnahs on the 11th of March 1873. On examining that decree it appears to us that it was so. The case, therefore, must be disposed of on other grounds.

The object of the special appellant here is to set aside the judgment of both the Courts below on the ground that it is inconsistent with the terms of s. 61 of Act VIII of 1869 (B.C), which says that "if *after sale of any such under-tenure in execution of decree* any portion of the amount decreed remains due, process may be applied for and issued against any other property, moveable or immoveable, belonging to the debtor." In this case the under-tenure, of which the arrear was decreed to be due, has not been sold. Therefore, in the words of the section, execution cannot proceed against any other immoveable property of the debtor. But it is contended that inasmuch as the tenure had been attached and subsequently released from attachment by an order of Court, and as execution therefore could not proceed against it, the judgment-creditor is clearly entitled to proceed against other immoveable property of the debtor.

In the first place it does not appear that the creditor has exhausted all the remedies open to him. On the order of the Subordinate Judge releasing the property from attachment it was open to him by a regular suit to show that the property was really liable to be sold in execution of his decree. Besides, it appears to us that if we are to go into the question of the equity of the judgment-creditor, we must look at the whole of the facts. On the statement of facts put before us it seems to me, speaking for myself, perfectly clear that the judgment creditor is not entitled to the equitable relief he seeks. (The learned Judge proceeded to go into the facts of the case, and continued.) Whatever may be the rights of a zemindar holding a decree for rent against one of his tenants in respect of the sale of the tenure on which the arrears have accrued, when such rights are put forward in opposition to the rights of third parties, it seems to me that it is impossible for any zemindar to put forward a claim under the Rent Law which shall take effect against his own acts done as in this case under the Code of Civil Procedure. It is sufficient to state the circumstances of the original sale to show that when nominal arrears are said to have accrued due from Hurrish Chunder, the appellant, on the tenure nominally sold to him, but previously sold to others; and when it is sought to seize and sell other property of Hurrish Chunder for such arrears, the whole proceedings are certainly tainted by want of equity. Therefore, when the zemindar comes here and asks us to give him an equitable relief against the distinct words of the Statute, it seems to me that his mouth is completely closed by reference to his own proceedings in 1869.

I would, therefore, reverse the judgments of both the Courts below with costs.

MORRIS, J.—I concur in thinking that no further execution as asked for can be taken out.

Appeal dismissed.

Before Mr. Justice Kemp and Mr. Justice Morris.

1878
March 7.

RAMSOONDER SANDYAL (JUDGMENT-DEBTOR) *v.* GOPESSUR MOSTOFEE AND OTHERS (DECREE-HOLDERS).*

Execution—Claim—Suit—Limitation—Act VIII of 1859, *ss.* 212, 246—*Act IX of* 1871, *Sched. II, art.* 167.

Within three years of his first application in execution of a rent-decree, *A*, the judgment-creditor, made a second application to sell certain lands, the alleged property of *B*, the judgment-debtor. Third parties intervened, who established their claim to the land. *A* thereupon brought a regular suit, and succeeded in obtaining a decree, declaring the lands in suit to be the property of *B*. Within a year of the date of this decree, but more than three years after his first application for execution, *A* filed a third application for attachment of *other lands* belonging to *B*. *Held*, the application was barred by limitation.

Baboo Pyaroo Tuhobildarinee v. *Syud Nazir Hossein* (1) distinguished.

ON the 1st August 1864 the plaintiff obtained a decree in a suit for rent against the defendant (afterwards confirmed by the High Court), and on the 2nd of January 1869 applied for execution of his decree under s. 212 of Act VIII of 1859. On the 22nd November 1870 the decree-holder made a second application to sell the right, title, and interest of the judgment-debtor in a certain decree and certain lands were specified in such application. Third parties intervened under s. 246 of Act VIII of 1859, and on this claim the properties were released from attachment. On the 6th December 1871 the decree-holder instituted a regular suit to establish the right of his judgment-debtor to the lands previously attached and obtained a decree on the 22nd April 1872. This decree was upheld by the High Court on the 16th July 1874. Before the final order, the decree-holder made a third application on the 6th September 1873, asking that a certificate might be sent to the Munsif of Nattore in order that proceedings in execution

* Miscellaneous Special Appeal, No. 252 of 1877, against the decree of H. Beveridge, Esq., Officiating Judge of Zilla Rungpore, dated 12th May 1877, reversing the order of Baboo Shamchand Dhur, Munsif of Bograh, dated 19th January 1876.

might be taken against property belonging to the judgment-debtor in that district other than the property the subject of the regular suit. The application contained no reference to the properties which were the subject of the regular suit. The only paper filed with the application was the original decree of the 1st of August 1864 for rent, and the subsequent orders of the Judge and of the High Court confirming that decree. The Court of first instance rejected the application as barred by limitation, on the ground that the judgment-creditor had not shown due diligence in filing his regular suit after the successful issue of the claim made by the intervenors under s. 246 of Act VIII of 1859. The lower Appellate Court, on the authority of *Baboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (1) reversed the decision of the Court below. The judgment-debtor appealed to the High Court.

Baboo *Mohini Mohun Roy* for the appellant.

Baboo *Rash Behari Ghose* for the respondents.

Baboo *Mohini Mohun Roy.*—*Baboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (1), the case quoted by the Court below, does not apply to the present case. Here there was a fresh application for attachment of different lands; the application was silent upon, and therefore must be taken to have purposely ignored, all the proceedings under the regular suit. It must, therefore, stand or fall on its own merits; and being admittedly made beyond time, is barred by limitation. Nor can the application be brought within art. 167, Sched. II of Act IX of 1871, as it was not made to keep in force a previous execution proceeding.

Baboo *Rash Behari Ghose.*—The last application made by the judgment-creditor may be said to have been one to "keep in force" a previous decree or order of the Court—see *Chunder Coomar Roy* v. *Bhuggobutty Prosonno Roy* (2); and having

(1) 23 W. R., 183. (2) I. L. R., 3 Calc., 235, S. C., 1 C. L. R, 23.

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been made within three years of the previous application of the 22nd November 1870, is within time. Again, the decree-holder was obstructed in obtaining execution of his decree; the time occupied in removing these obstructions cannot be included in the period of limitation applicable to this case. The case quoted by the lower Court strictly applies to the fact of this case. The form and method of application lastly made by the judgment-creditor may be open to comment, but the Court will look rather to the facts which preceded that application, and not to the way in which the application was made.

Baboo *Mohini Mohun Roy* in reply.

The judgment of the Court was delivered by

KEMP, J. (who, after shortly stating the facts, continued) :—It is contended by the pleader for the special appellant that if the starting point is to be the application under s. 212, which was made on the 2nd of January 1869, then the present application having been made more than three years from that date is barred. On the other hand, it is contended by the pleader who appears for the respondent that the application of the 6th of September 1873 is within time, as the last previous application was made on the 22nd of November 1870. That was an application to sell the interest of the judgment-debtor in a certain decree and certain specified properties.

The pleader admits that this application of the 22nd November 1870 was not made under s. 212 of the Civil Procedure Code, but he says that it was an application "to keep in force" the decree within the meaning of art. 167 of Sched. II of the Limitation Act as interpreted by the Full Bench in *In re Chunder Coomar Roy* v. *Bhuggobutty Prosonno Roy* (1). But we think that this reasoning is wrong. The application being for sale of certain properties already under attachment under an order issued on the application of the 2nd of January 1869, it was clearly an application to enforce the decree, and not one merely to keep the decree alive in the sense intended by the Full Bench. But the

(1) I. L. R., 3 Calc., 235, S. C, 1 C. L. R., 23.

pleader further contends, on the strength of the decision of Justices Markby and Romesh Chunder Mitter, in the case of *Baboo Pyaroo Tuhobildarinee* v. *Syud Nazir Hossein* (1), that the application of the 6th September 1873 must be treated as an application to revive and continue the proceedings instituted on the previous application of the 2nd of January 1869, those proceedings having been stayed for a time,—*i.e.*, from the 19th December 1870 to July 1873,—by reason of the judgment-creditor being forced to maintain, by a regular suit instituted for the purpose, the right of the judgment-debtor to the properties under attachment against third parties. But we observe that the circumstances of the case quoted differ materially from those in the present case. Mr. Justice Markby, who delivered the judgment of the Court, says: "Whatever may be the form of the last application, dated the 5th December 1873, in substance it was an application to the Court for the continuation of the former proceedings on the ground that the bar that was set up by reason of the adverse order under s. 246 had been removed by the decision in the subsequent regular suit;" and, therefore, for these reasons the learned Judges held that it was not an application to execute the decree within the meaning of Sched. II, art. 167, of Act IX of 1871. Now, in the present case, we find that these remarks do not in any way apply. The present application made by the decree-holder on the 6th of September 1873 was as follows:—In the 9th column of the application in which he sets out the relief which he asks for from the Court,—namely, that the judgment-debtor's property being situated within the Chowkee of the Munsif of Nattore, it is necessary for him, the decree-holder, to take out a certificate before he can attach property within that jurisdiction, and he therefore prays the Court to forward a certificate of non-satisfaction to the Court of the Munsif of Nattore to enable the decree-holder to proceed to attach and sell the property situated within that jurisdiction; further, with that application he presented the original decree of 1864 for rent, and the subsequent orders of the Judge and of the High Court

(1) 23 W. R., 183.

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confirming that decree. It thus appears that the application contained no reference to the properties which were the subject of the regular suit, and was not therefore either in substance or in form such an application as was contemplated by Mr. Justice Markby in his judgment in the case above quoted.

It is not as though the judgment-creditor had represented that the obstacle which existed to obtaining satisfaction by selling the decree No. 11 of the Subordinate Judge of Rajshahye, in which the judgment-debtor had a title, had been removed by the reversal of the proceedings under s. 246. On the contrary, he asked for a certificate to be sent to the Munsif of Nattore in order that he might proceed against property which, so far as we understand, was quite independent of the property the subject of the regular suit, which suit had its origin in proceedings adverse to the judgment-creditor under s. 246. We are, therefore, of opinion that the case relied upon by the pleader for the respondent is not applicable to the circumstances and facts of the present case, and as it is clear that the application of the 22nd of November 1870 is not an application to keep the decree in force within the meaning of the Full Bench Ruling referred to, the judgment of the Judge must be reversed, that of the Munsif restored, and the appeal decreed with costs.

Appeal decreed.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1878 *Feb.* 14.

LATI KOOER (DECREE-HOLDER) *v.* SOBADRA KOOER (JUDGMENT-DEBTOR).*

Practice—Execution of Decree—Mesne Profits—Act XXIII of 1861, *s.* 11.

A sued *B* and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the

* Miscellaneous Special Appeal, No. 200 of 1877, against the order of A. V. Palmer, Esq., Judge of Zilla Shahabad, dated the 9th of May 1877, affirming the order of Moulvie Imam Ali, Munsif of Buxar, dated the 17th of February 1877.

land was in possession of *A. B* thereupon, seeking execution of the Appellate Court's decree, applied to be reinstated in possession, and also for an order awarding her mesne profits for the time during which she was out of possession of the said lands. *Held*, that upon such application, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement (1).

IN this case Mussammut Sobadra Kooer, the judgment-debtor and present respondent, had obtained possession of certain land under a decree dated the 7th May 1870 against the present decree holder. This decree after a remand by the High Court was reversed by the lower Appellate Court on the 14th May 1874. The present decree-holder, the defendant in the original suit, applied to the Munsif's Court for possession of the property taken in execution under the first decree, and also asked for mesne profits in respect of the time during which she was out of possession, and further asked that such mesne profits should be calculated and awarded to her in execution of the decree of the lower Appellate Court which set aside the decree for possession obtained by the present judgment-debtor in the Court below. The Court of first instance refused the application on the ground that the decree-holder could not produce any distinct decree under which mesne profits had been specifically awarded. The lower Appellate Court upheld the decision on the ground that where a decree is silent touching interest or mesne profits, the Court executing the decree cannot assess or give execution for such interest or mesne profits, and quoted the case of *Sadasiva Pillai* v. *Ramalinga Pillai* (2) in support of this view. It was further of opinion that the judgment-debtor's possession between Bhadro and Falgoon 1281 (August 1874 and January 1875) had not been established. The decree-holder now preferred this appeal to the High Court.

Baboo *Pran Nath Pandit* for the appellant.—This application for mesne profits is maintainable under s. 11 of Act XXIII of 1861. In executing the decree of the Appellate Court, the

(1) See ss. 44, 111, and 112 of the Civil Procedure Code (Act X of 1877)

(2) 9 Moo. I. A., 506, 15 B. L. R., 383, 24 W. R., 193.

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Court below was bound to make complete restitution to the person affected by the former erroneous decree. See *Nursing Chunder Sen* v. *Bidyadhurie Dossee* (1), *Chowdhury Shib Narain Pohraj Mandhati* v. *Chowdhry Kishore Narain Pohraj Mandhati* (2), *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia* (3), *Sheikh Wahid Ali* v. *Musst. Jamaye* (4), *Raj Kissen Singh* v. *Baroda Debea* (5), *Bibee Hamida* v. *Bibee Bhudhur* (6), *Bama Soondery Debea* v. *Tarini Kant Lahori* (7), *Gooroo Doss Roy* v. *Stephens* (8), *Raja Lelanund Singh* v. *Moharajah Lukhimpore* (9), *Meer Gowhur Ali* v. *Hurpal Bhugat* (10), *Ununt Ram Hazra* v. *Kuralee Pershad Mistree* (11).

Baboo *Taruck Nath Paulit* for the respondent.—Where a decree is silent as to amount of mesne profits, the decree-holder cannot obtain mesne profits in execution of his decree—*Hurro Chunder Chowdhry* v. *Sooradhonee Debea* (12): the same rule holds in respect of interest—*Mosoodun Loll* v. *Bekaree Singh* (13). Mesne profits are essentially in the nature of damages which do not exist as an obligation to the discharged, but are only payable when due under an order of Court—*Huro Mohini Chowdhrain* v. *Dhun Monee Chowdhrain* (14). Even in cases where mesne profits are given up to date of institution of suit, the Court executing the decree is strictly confined to the words of the decree and can give no more—*Janokee Nath Mookerjee* v. *Raj Kristo Singh* (15), *Syed Shah Ameen Ahmud* v. *Syed Shah Zameer Ahmud* (16), *Bhoobunessuree Chowdhrain* v. *Mansor* (17).

Cur. ad. vult.

(1) 2 W. R., 275.
(2) 10 W. R., 131.
(3) B. L. R., F. B., 985; 9 W. R., 403.
(4) 2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149, 11 W. R., F. B., 1.
(5) 6 W. R., Miscl. R., 111.
(6) 20 W. R., 239.
(7) 20 W. R., 415.
(8) 21 W. R., 195.
(9) 13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23.
(10) 22 W. R., 445.
(11) 23 W. R., 441.
(12) 1 W. R., Misc. Rul., 5.
(13) B. L. R., F. B., 602; 6 W. R. Miscl. Rul., 109.
(14) 10 W. R., 62.
(15) 15 W. R., 292.
(16) 18 W. R., 122.
(17) 22 W R., 160.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the facts of the case, continued):—It appears to us that the view taken by the subordinate Courts is not correct. A number of decisions of this Court have been cited, which lay down that where property has passed in execution of a decree, and that decree has been set aside, the Court which gave possession of the property is bound to make complete restitution to the person injured by its cancelled decree. The first of those decisions is *Nursing Churn Sein* v. *Bidyadhuree Dossee* (1); that no doubt is not a case exactly in point. The question there was with reference to a specific sum of money taken out from the Collectorate treasury in execution of a decree; but we think that the principle on which the Court then based its judgment is the same as that on which the judgments in cases to be quoted further on are based. There is a case in *Chowdhry Sib Narain Pohraj Mandhata* v. *Chowdhry Kishore Narain Pohraj Mandhata* (2), which is distinctly in point; and in that case Mr. Justice Bayley in delivering judgment cites the opinion of the late learned Chief Justice Sir Barnes Peacock—*Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Dabea* (3). Sir Barnes Peacock said that "the decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed, and I should have considered that a decree of reversal necessarily authorized the lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived by reason of its having been enforced." Further on he says: "In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution. It is not a mere matter of discretion with the Court which reverses a decree whether the party against whom it was given is or is not be restored to what he has been deprived of under

(1) 2 W. R., 275.
(2) 10 W. R., 131.
(3) B. L. R., F. B., 985; 9 W. R., 403, 407.

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it There can be no doubt that in point of justice the plaintiff was entitled to have the rents which the defendant had collected from her land whilst he was in possession of it under the erroneous decree, refunded. This case is not like *Sheikh Wahid Ali* v. *Musst. Jamaye* (1), a Full Bench case, in which it was held that it was discretionary with the Court which passed the decree to award interest or not." The learned Chief Justice goes on then to cite another case—*Rajkissen Singh* v. *Baroda Dabea* (2).

Then there are two cases, *Bibee Hameda* v. *Bibee Bhudhun* (3) and *Bama Soonduree Dabea* v. *Tarini Kant Lahori* (4), in which the same view is adopted; and again in *Gooroo Dass Roy* v. *Stephens* (5), there is a case which came before Mr. Justice L. S. Jackson and myself, in which we held that, with reference to the judgment of the Privy Council in *Raja Leelanund Singh* v. *Maharaja Luckimpore Singh* (6), this Court was bound to carry out the order for the reversal of a previous order to the full extent so as to relieve the person injured by the first order from all its consequences. The same view was followed in *Meer Gowhur Ali* v. *Hurpal Bhugut* (7) and *Ununt Ram Huzrah* v. *Kuralee Pershad Mistree* (8).

The cases cited on the other side do not appear to us to be directly in point. They are, *Hurro Chunder Chowdhry* v. *Sooradhoonee Dabea* (9), *Mosoodun Lall* v. *Bheekaree Singh* (10), *Huro Mohini Chowdhrain* v. *Dhun Monee Chowdhrain* (11), *Janokee Nath Mookerjee* v. *Rajkristo Singh* (12), *Syud Shah Ameer Ahmud* v. *Syud Shah Zameen Ahmud* (13), *Bhoobunessuree Chowdhrain* v. *Mansor* (14), *Kaleenath Doss* v. *Rajah Meah* (15). On reference to these cases, it will be seen that the whole of them refer to the extension of the original decree, and not to the effect of an order for the reversal of a decree.

(1) 2 B. L. R., F. B., 73; 11 B. L. R., P. C., 149; 11 W. R., F. B., 1.
(2) 6 W. R., Misc. Rul., 111.
(3) 20 W. R., 239.
(4) 20 W. R., 415.
(5) 21 W. R., 195.
(6) 13 Moo. I. A., 490; 5 B. L. R., 605; 14 W. R., P. C., 23.
(7) 22 W. R., 445.
(8) 23 W. R., 441.
(9) 1 W. R., Misc. Ru., 5.
(10) B. L. R., F. B., 602; 6 W. R., Misc. Ru., 109.
(11) 10 W. R., 63.
(12) 15 W. R., 292.
(13) 18 W. R., 122.
(14) 22 W. R., 160.
(15) 22 W. R., 406.

The case cited by the Judge and a later case—*Forrester* v. *Secretary of State* (1)—only go so far as to establish what had been the practice of all the Courts in India, namely, that nothing could be added to a decree in course of execution; but in this case it is not a question of adding to the decree at all. What the Court is asked to do is simply to set aside that which has resulted from its own action taken under an erroneous decree.

With reference to the case *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Dabea* (2), it ought to be mentioned that Mr. Justice Loch apparently did not altogether assent to the views expressed by the Chief Justice. An examination of that case, however, will show that in fact it belongs to the same class of cases as the other cases cited by the respondent, namely, that it may be treated as a case in which there was an attempt to extend a definite order. This will be seen by referring to page 405 of the same volume. It is there said that "the Sudder Court, on the 13th of May 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the then plaintiff, and directed that the property should remain with the present plaintiff, who, as widow in the absence of an adoption, was entitled to the estate during her life as heir of her deceased husband." So that there was a definite declaration by the Court; and it might be agreed that it made that declaration advisedly, and that it was its intention not to go further than that.

In the present case, from the form of the proceedings stated above, it is evident that there could have been no such express or implied intention of the Court which set aside the decree under which possession had been taken. It was, therefore, open to the Munsif in the present application to do all that was necessary to make the restitution complete.

The Judge has said in his judgment: "I note further that the *de facto* possession of Mussamut Sobadra between Falgoon and Bhadro 1281 is not established." If this were a finding of fact come to on the evidence, no doubt sitting here in special appeal we would be unable to deal with it; but it appears to us

(1) L. R., 4 I A, 137. (2) B L. R, F. B., 985; 9 W. R., 403.

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that it cannot be treated as such, for although there is evidence on one side which has been uncontradicted by evidence on the other, it does not appear that any particular time was fixed for the parties to appear in Court with all the evidence that they might have to give on questions of fact. The only order which has been brought to our notice is one by which the 23rd of January 1877 was fixed for hearing. That order is to this effect, that it is for the hearing of argument and for making such order as may there be necessary: and it is evident that this was the course adopted by the Munsif. He dealt with the case as one which could probably be disposed of simply on a question of law: and he in fact did dispose of it on a question of law without going into the facts at all. Had his decision been the other way, we think it would follow from the order by which the 23rd of January was fixed for hearing, that he would then have made some order for proceeding upon evidence on the merits of the case. In the absence of such order, the appellant cannot be concluded by the evidence produced by the other side and the absence of evidence on her part.

The case must, therefore, go back to the Court below to ascertain whether, as a matter of fact, Mussamut Sobadra ever was in possession of the property as the result of the execution of her decree; and if so, how much the appellant is entitled to receive from her as mesne profits in respect of the time during which she was in possession.

Costs will follow the result.

Case remanded.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

SYUD MAHOMET HOSSEIN AND OTHERS (APPELLANTS) *v.* HADZI ABDULLAH AND OTHERS (RESPONDENTS).*

1878
April 10

Registration—Right to Appeal—Act VIII of 1871, *s.* 76—*Repeal of Act VIII of* 1871 *by Act III of* 1877—*General Clauses Act. II of* 1868, *s.* 6.

An order refusing registration of a deed was passed on 23rd August 1872, and when Act VIII of 1871 was in force, an application for review was presented, and finally rejected on 20th December 1877 after the repeal of Act VIII of 1871 by Act III of 1877. *Held* that, under the provisions of s. 6 of Act I of 1868 (the General Clauses Act), the proceedings must be governed by the Act in force at the time when they were instituted,—namely, by Act VIII of 1871, and therefore no appeal would lie.

IN this case an appeal was originally presented to the Judge of Gya under s. 73 of Act VIII of 1871, from an order of refusal to register a deed presented for registration, the ground of refusal being that one of the parties to the deed denied its execution. The Judge, on 23rd August 1872, rejected the appeal but his successor, on 19th September 1873, issued a rule calling on the other side to show cause why a review should not be admitted; and on the 4th January 1873 he admitted a review of his predecessor's order, and the cause was set down for further hearing.

The order admitting the review was set aside by the High Court on appeal, as being in excess of the Judge's powers (1); but the order of the High Court was in turn set aside by the Privy Council (2), and the application for review was ultimately restored, and heard, but rejected on 20th December 1877. The present appeal was thereupon preferred.

The Registrar submitted the case to the High Court for orders as to whether or not the appeal should be admitted, stating that

* Memorandum of Appeal against the decision of E. Grey, Esq., District Judge of Gya, dated the 20th December 1877, making the opposite party respondent. No. of Case in lower Court, 1 of 1872.

(1) See *In the matter of the petition of Hadjee Abdoollah*, 10 B. L. R. 394.

(2) See *Reasut Hossein* v. *Hadjee Abdoollah*, I. L. R., 2 Calc., 131.

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if the present appeal were viewed as one from an order simply rejecting an application for review, it would not lie under s. 629 of the new Civil Procedure Code, Act X of 1877, which declares that such an order is final; and if it were viewed as an appeal from an order refusing to register the deed, it would still not lie, since under s. 76 of Act III of 1877, the order of the District Judge is final, and the old Registration Act (Act VIII of 1871, s. 76) was to the same purport.

Moonshee *Mahomed Yusuf*, for the appellants, contended that he was entitled to an appeal, because Act VIII of 1871 was repealed by Act III of 1877, and the jurisdiction vested in the District Court by ss. 73 and 76 of Act VIII is vested in the Registrar by ss. 72, 73, 75, and 76 of Act III of 1877, and by s. 77 of that Act jurisdiction is given to the ordinary Civil Courts to entertain suits for a decree directing documents to be registered; and as the proceedings in this case terminated after Act III of 1877 had come into force, the order appealed against should be taken to be an order contemplated by s. 77, against which there is an appeal.

No one appeared on behalf of the respondents.

The judgment of the Court was delivered by

AINSLIE, J.—The Registrar of Deeds having refused to register a certain document, an application was made in 1872 to the District Judge under Act VIII of 1871. On 23rd August 1872 the District Judge rejected the petition on the ground that the execution of the deed had not been proved. In September 1872 Reasut Hossein applied for a review of judgment, and on the 19th September 1872 the District Judge issued a rule calling upon the opposite party to show cause why the review should not be admitted. On the 4th January 1873 the rule was made absolute, the review admitted, and the cause set down for further hearing. This order of the 4th January 1873, therefore, had the effect of cancelling the original order of the Judge and reopening the proceedings commenced by the petitioner in 1872 under s. 74 of Act VIII of 1871.

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The final order of the Judge on that application was made on 20th December 1877, when Act VIII of 1871 had been repealed. It was entitled as a review of judgment in suit No. 1 of 1872. By s. 2 of Act III of 1877, which came into force on the 21st April 1877, Act VIII of 1871 was repealed; but by the provisions of the General Clauses Act (Act I of 1868, s. 6), the repeal of that Act does not affect any proceedings commenced before the repealing Act shall have come into operation. The consequence is that these proceedings having commenced before Act III of 1877 came into operation, must be governed by the provisions of the Act in force at the time when they were instituted,—namely, Act VIII of 1871. Section 76 of Act VIII of 1871 contains instructions for proceedings of the Court on a petition of a person whose application for registration has been refused, and concludes with these words that no appeal lies from any order under this section. The procedure under the present Registration Act is altogether different from that under the Act of 1871, and we have no doubt that the case must be governed by the former Act. Therefore, the appeal cannot be entertained.

Appeal rejected.

Before Mr. Justice Markby and Mr. Justice Prinsep.

IN THE MATTER OF HARASATOOLLAH AND OTHERS (PETITIONERS) *v.* BROJONATH GHOSE (OPPOSITE PARTY).*

1878 *April* 1.

Immoveable Property—Sale in Execution of Decree—Dispossession of Third Person—Obstruction to Purchaser—Act VIII of 1859, *s.* 269—*Civil Procedure Code (Act X of* 1877), *ss.* 318, 319, 334, 335—*Limitation Act (XV of* 1877), *Sched. II, art.* 165.

There is no provision in the Civil Procedure Code, similar to that contained in s. 269 of Act VIII of 1859, which enabled the Court executing a decree to enquire into a complaint made by a person other than the defendant, on the ground of dispossession in the delivery of possession to the purchaser of

* Small Cause Court Reference No. 393 of 1878, from the order of Baboo Sreenath Roy, Bahadoor, Subordinate Judge, and Judge of Small Cause Court of Hooghly, dated the 23rd February 1878.

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immoveable property sold in execution of a decree; and, therefore, the only remedy of a person so dispossessed is by regular suit.

A, a decree-holder, purchased certain property belonging to *B*, his judgment-debtor, at a sale in execution of his decree, and delivery of possession to him was ordered. A stranger to the suit, hereupon, presented a petition to the Court executing the decree, setting up a title to a moiety of the property in question, and prayed for an investigation into his right, and for recovery of possession on the ground that he had been dispossessed by *A*. *Held*, that the application could not be maintained.

THE following was the referring order in this case :—

"In execution of a decree obtained by one Brojo Nath Ghose against one Sumeruddin, the property, which is the subject of the present dispute, was sold as the property of the judgment-debtor, and purchased by the decree-holder himself. The purchaser, as usual, asked the assistance of the Court to be put in possession of the property purchased by him, and delivery of possession was ordered under the due course of law. The applicant thereupon presented a petition setting up a title to a moiety of the property, for an investigation into his rights, and for recovery of possession on the ground of having been dispossessed by the said purchaser. It is contended on behalf of the purchaser that there is no provision in the Civil Procedure Code under which an application like this can be maintained. I think this contention is valid. Under s. 269 of Act VIII of 1859 a complaint made by the purchaser on account of resistance in obtaining delivery of possession of the purchased property, as well as a complaint made by a party other than the defendant on the ground of dispossession in the delivery of possession to the purchaser, could be maintained and enquired into. But, under the new Act of 1877, the former is maintainable under ss. 334 and 335; but the Act is silent with reference to the latter. There is, therefore, no provision in the new Code giving a right to a person dispossessed in delivering possession to the purchaser of the purchased property, for an enquiry into his rights. His remedy is by a regular suit.

"It is contended on behalf of the applicant, that if a party other than the defendant, dispossessed in delivering possession to a decree-holder of the decretal property, can have a summary

remedy, it is anomalous to think that a party other than the defendant can have no such remedy when he is dispossessed by a purchaser at an execution-sale. I think this plea is quite fallacious. In the first place there is an express provision with regard to the first-mentioned point, s. 332, but there is none with reference to the last-mentioned one. In the next place in the former case, the dispute is between the decree-holder, a party to a pending case, and another, which, if not adjudicated upon, justice cannot be attained; while in the latter case, the dispute is between two strangers, quite unconnected with the case in which the decree was passed or with the execution thereof. It is reasonable, therefore, that such parties should be left to settle their dispute in a case between themselves, and that the Court executing the decree should not be encumbered to try a point foreign to the execution proceedings and without a case to that effect.

"The applicant's pleader then pointed out to me art. 167 of Sched. ii, div. 3, of the Limitation Act, and argued that, unless an application of the present nature was maintainable, the limitation for such an application would not have been provided for in the Limitation Act. The article under notice runs thus: "Complaining of resistance, &c., to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property." I must confess I do not find my way clear to reconcile this provision with the provisions of the Civil Procedure Code. My query, therefore, is whether the present application is maintainable in the execution department, or the applicant should be told to seek remedy in regular course of law. I reserve judgment in the matter until receipt of the Court's decision on the points."

The parties were unrepresented.

MARKBY, J.—The Subordinate Judge seems to have correctly explained the present state of the law. If the purchaser at a sale in execution of a decree be resisted or obstructed when being put in possession by the Court, as provided for by s. 318 or s. 319 of the Code of Civil Procedure of 1877, the Court can now act only under s. 334 or s. 335

1879.

IN THE MATTER OF HARASAT-OOLAH v. BROJONATH GHOSE.

Section 318 provides for the giving of what is usually termed khas possession to an execution-purchaser, and the Court is empowered to "order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. If resistance or obstruction is made by the judgment-debtor or any one on his behalf, the provisions of chap. xix of the Code relating to resistance or obstruction to a decree-holder are applicable to s. 334. If, on the other hand, the property sold was not in the khas possession of the judgment-debtor, but is in the occupancy of a tenant or other person entitled to occupy the same, possession by publication of his title is given to the execution-purchaser. And s. 334 provides for a summary enquiry on "resistance or obstruction caused by any person other than the judgment-debtor *not* in possession of the property sold, but claiming a right thereto as proprietor, mortgagee, lessee, or under any other title," if such resistance or obstruction be made the subject of complaint by the purchaser.

No provision is, however, now made if the obstruction or resistance to the possession of an auction-purchaser is caused by a third party, a stranger, claiming to be in actual possession or a title altogether independent of the judgment-debtor.

Section 331 provides for such a case, but only when possession is being given to a decree-holder in execution of a decree; and this does not apply to an execution-purchaser.

Section 269 of the Code of 1859 provided for this case, and we do not understand why it has been omitted from the present Code of 1877, and this omission is the more remarkable because the law of limitation, passed almost simultaneously with the present Code, in Sched. II, art 165, seems to contemplate a summary enquiry by the Courts on the application by a person dispossessed of immoveable property and disputing the right of the purchaser at a sale in execution of a decree to be put in possession, since it provides a term within which suit or application by such a person for redress should be made.

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IN THE GOODS OF GASPER

which was at that time leviable under the law in force, *viz.*, a commission fee amounting to Rs. 10. On the 30th April 1878 Johannes George Bagram died, and in May of the same year two of the sons of the testator applied for probate.

The Registrar was of opinion that an *ad valorem* duty of 2 per cent. was chargeable on the value of the unadministered estate under cl. 11 of the 1st schedule of Act VII of 1870. In support of this view he cited the case of *In the Goods of Chalmers* (1), the Financial Notification No. 2623 of 24th April 1874, and s. 19 of the Court Fees Act, read with s. 6 (19*c*) of Act XIII of 1875.

Mr. *G. Gregory* for the executors.—The duty claimed here is not payable under Act VII of 1870, or Act XIII of 1875; those Acts can only apply to cases where the testator dies after those Acts have come into operation. To apply the provisions of the Court Fees Act to the present case would be to give a retrospective effect to the Act. In cases of this description the Courts have always been averse to construe Acts in that manner; see Maxwell on the Interpretation of Statutes, p. 192, and the case of *Earl Cornwallis* (2). To put a retrospective construction on the Act would be, in the present case, to subject the estate to a heavy duty under an enactment the provisions of which do not expressly apply, the duty leviable at that time when the first probate was taken out having already been paid; and further there is no express provision in the Act applicable to cases of wills admitted to probate before the Act came into force.

The Advocate-General (Mr. *Paul*) for the Crown—Act VII of 1870 expressly requires that *ad valorem* duty shall be paid upon any grant of probate, and the amending Act, Act XIII of 1875, s. 6 (19*c*), merely states, "that when the full fee chargeable under the Court Fees Act has been once paid, no fee shall be chargeable under the same Act on any further grant

(1) 6 B. L R., Apx., 137.

(2) 25 L. J, Ex,, 149 S. C., 11 Ex., 580.

made in respect of the whole or any part of the same property belonging to the same estate." Now the probate duty payable under the Court Fees Act has never in this case been paid before. The only fee that has been paid is a commission fee of Rs. 10, payable under the law in force when the first probate was taken out. So, clearly, the exemption claimed under s. 6 (19c) of Act XIII of 1875 does not apply to the present case. The case of *In the Goods of Chalmers* (1) is exactly in point.

The opinion of the Chief Justice was as follows:—

GARTH, C. J.—I think it is quite clear that the *ad valorem* duty must be paid upon the present grant of probate. At the time when the first grant of probate was made to one of the executors named in the will, no *ad valorem* duty was payable. The only sum charged was a commission fee of Rs. 10. That executor has died, and the other two executors now wish to prove the will. Act VII of 1870 requires the *ad valorem* duty to be paid upon any grant of probate, and I find no provision exempting these executors from payment of the duty. In fact, but for the official notification made under the provisions of the Act, dated the 24th of April 1874, the *ad valorem* fee would be payable a second time upon any second grant of probate. But here no injustice is done, because the duty has never been paid upon this property.

The case of *In the Goods of Chalmers, deceased* (1), decided by Sir R. Couch, is in point, and is entirely in accordance with the view which I take of this question.

The English case to which my attention has been called by Mr. Gregory—*In re the Executors of Lord Cornwallis* (2)—will be found to have no application to the present. That case merely decided that the Succession Duty Act of 1853 did not apply to annuities granted before the passing of that Act.

Attorney for the executors: Mr. *Zorab*.

Attorney for the Crown: The *Government Solicitor*.

(1) 6 B. L. R., Apx, 137.
(2) 25 L. J., Ex., 142; S. C., 11 Ex., 580.

Before Sir Richard Garth, Kt., Chief Justice

1878
April 29.

IN THE GOODS OF RUSHTON (DECEASED).

Probate—Ad valorem Fee—Annuity charged upon Property of Testator—Court Fees Act (Act VII of 1870), *sched. i, cl.* 11.

Where it appeared that property disposed of by a will was bequeathed to the testatrix subject to the payment thereout of an annuity for life to a person who survived her,—*held*, that the *ad valorem* fee prescribed by sched. i, cl 11, of the Court Fees Act ought to be levied upon the value of the property, less the capitalized value of the annuity.

THIS was a reference under s. 5 of Act VII of 1870, made by Mr. Belchambers, the Taxing Master of the Court:—

"In this case a grant of probate of the will of the deceased has been obtained by her husband as the sole executor.

"The facts material to the present question are that the property disposed of by the will of the deceased was bequeathed to her by her late father, subject to the payment thereout of an annuity of Rs. 600 per annum for life to her brother, who is still living, and is now of the age of 50 years.

"Upon the facts it is submitted on behalf of the executor that the *ad valorem* fee prescribed by No. 11, sched. i of the Court Fees Act, 1870, ought to be levied, not upon the apparent value of the estate, but upon its actual present value, to be estimated after making an allowance in respect of the annuity payable thereout.

"To provide for the payment of this annuity, Rs. 15,000, at 4 per cent., would be required.

"It appears from a volume of actuaries' tables, to which I have been referred by the executor's attorneys, that the present value of £1, payable at the death of a person aged 50 at 4 per cent., is 10*s.* 7*d.* At that rate the present value of £1,500 (the equivalent of Rs. 15,000) payable at the death of a person aged 50, at 4 per cent., would be £793-15, or Rs. 7,937-8.

"The *ad valorem* fee is chargeable on the amount or value of the property in respect of which the probate, or letters, or certificate shall be granted,—that is, on the amount or value at

the time of the grant, and not at some future time; see the *Attorney-General* v. *Partington* (1), affirmed in error (2).

"The actual present value of the property in the present case cannot be arrived at without deducting the value of the annuity.

"Proceeding upon the basis of the figures already given, the difference between Rs. 15,000 and Rs. 7,933-8, *viz.*, Rs. 7,066-8, is the value of the annuity, and ought to be deducted from the total amount of assets. The balance after such deduction will represent the actual present value of the estate upon which the *ad valorem* fee is leviable.

"The value of an annuity of £60 per annum held on a single life, if calculated according to the tables in the schedule annexed to the Succession Duty Act (16 and 17 Vict., c. 51) would be £745-15-8, equivalent to Rs. 7,457-13, or Rs 359-5 in excess of the value arrived at as the result of the calculation made according to the actuaries' tables.

"As the question is one of general importance, it is referred for final determination to the Honorable the Chief Justice, as required by s. 5 of the Court Fees Act, 1870."

No counsel appeared to argue the point.

The opinion of the Chief Justice was as follows :—

GARTH, C. J.—It appears to me that Mr. Belchambers is perfectly right, and that the value of the property must be the value at the present time, less the capitalized value of the annuity.

(1) 1 H. & C., 457 (2) 3 H. & C., 193.

1878
May 8.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Markby, and Mr Justice Romesh Chunder Mitter

JOYKISTO COWAR (ONE OF THE DEFENDANTS) *v.* NITTYANUND NUNDY AND OTHERS (PLAINTIFFS).

Hindu Law—Ancestral trade carried on for benefit of Infants—Liability of Infant—Contract Act (IX of 1872), *s.* 247*—Decree on Appeal—Act VIII of* 1859, *s.* 337*—Act X of* 1877, *s.* 544.

Where the ancestral trade of a Hindu was carried on after his death for the benefit of his infant children by their guardian, and debts were incurred by the firm in the course of business,—*Held*, that the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor, and that, following the analogy of the rule laid down by s. 247 of the Contract Act, as to the liability of a minor admitted by contract into a partnership business, the minor is not to be held personally liable for the debts incurred in such trade, but that his share therein is alone liable.

The Court of Appeal has power under s. 337 of Act VIII of 1859 (corresponding with s. 544 of Act X of 1877) to draw up what would be a fair decree as regards all the parties to a suit, although some of them may not have appealed.

Petum Doss v. *Ramdhone Doss* (1), *Ramlal Thakursidas* v. *Lakhmichand Muniram* (2), and *Johurra Bibee* v. *Sree Gopal Misser* (3) followed.

THIS was a suit to recover the balance of an account for goods sold and delivered. It appeared that, on the 17th of March 1871, one Anundo Chunder Cowar died, leaving two sons, Nobokisto Cowar and Joykisto Cowar, the defendants, infants, and two widows. Anundo Chunder Cowar carried on business as a merchant and had repeated dealings with the plaintiffs, to whom he was indebted at the time of his death. After that time the widows, as the *kutrees* of the joint family, carried on the business and gave a power of attorney to manage it to one Harradhone Roy. The defendant, Nobokisto, after he came of age, managed the business jointly with Harradhone Roy. The plaintiffs continued to have dealings with the firm, and on the 12th April, Harradhone Roy, on behalf of the firm, signed a fresh hatchitta bringing forward a balance due from

(1) Tay., 279. (2) 1 Bom. H. C R, Appx., 71.
(3) I L. R, 1 Calc, 470.

the defendants to the plaintiffs, which was slightly reduced in the course of further dealings between the parties, and for this balance the plaintiffs sued.

Macpherson, J., decreed the plaintiffs' claim out of the property of Anundo Chunder Cowar. From this decree the infant defendant, Joykisto, appealed.

Mr. *Bonnerjee* and Mr. *Paulit* for the appellant.

Mr. *Branson* and Mr. *Allen* for the respondents.

GARTH, C. J.—It appears that Anundo Chunder Cowar, the father of the appellant, who is an infant, died on the 19th March 1871. Anundo Chunder, up to the time of his death, carried on business as a trader, and had dealings with the plaintiffs' firm. He died leaving him surviving the appellant and his elder brother Nobokisto, both then infants under the age of 16 years, and two widows. The sons and widows, after Anundo's death, lived as members of a joint Hindu family. The ancestral trade was carried on under the management of the widows.

The widows being purdanasheen women could not take the management of the ancestral trade directly into their own hands, but employed their son-in-law, one Harradhone, for that purpose; and it was under the direct supervision and management of Harradhone that the business was carried on. It is also proved that the appellant's elder brother Nobokisto, after he came of age, took part in the management with his brother-in-law Harradhone.

During the sole management of Harradhone, and also during the joint management of Nobokisto and Harradhone, dealings with the plaintiffs' firm continued; and in the course of these transactions, the defendants became indebted to the plaintiffs in the sum of Rs. 4,605-11-3. This debt entirely arises out of transactions connected with the ancestral business carried on by the defendants' family after Anundo Chunder's death.

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JOYKISTO COWAR v. NITTYANUND NUNDY.

The plaintiffs brought a suit to recover the amount, and Mr. Justice Macpherson has decreed the claim with this reservation that the amount decreed is to be realized out of the property of the deceased father, Anundo Chunder Cowar. Against this decree the infant, Joykisto, has alone appealed.

The questions that we have to determine are, whether the infant appellant is at all liable for this debt; and, if so, to what extent? It seems to us that, on the authority of decided cases—*Petum Doss* v. *Ramdhone Doss* (1), *Ramlal Thakursidas* v. *Lakmichand* (2), *Johurra Bibee* v. *Sree Gopal Misser* (3)—the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor; consequently the contention raised in this appeal, that the infant appellant is not liable to any extent for the debt in question, is not well founded.

On the other hand it seems to us only reasonable, as well as in accordance with legal principles, that a minor on whose behalf an ancestral business is carried on ought not to be held personally liable for the debts incurred in that business.

There must be some defined limit to the minor's liability.

The limit apparently laid down by Mr. Justice Macpherson is that all the ancestral property is to be rendered liable. But there may be instances in which this limit would be found manifestly inadequate and unsuited to reach the justice of the case. For example, petty trade in the time of an ancestor might expand after his death into a large flourishing business in the hands of a manager for infants. Debts arising out of this business would naturally become proportionately large, and it would seem unreasonable to hold that such debts should be recoverable from ancestral property only.

On the other hand the trade might not prosper, and in this case the minor ought not to be liable to account for trade losses out of any property unconnected with the assets of the business, which he may have received from his ancestor.

In the case of a minor being admitted into partnership in the ordinary way, s. 247 of the Contract Act (IX of 1872)

(1) Tay., 279. (2) 1 Bom. H. C. R., Appx., 71.
(3) I. L. R., 1 Calc., 470.

provides that for "any obligation of the firm" the share of the "minor in the property of the firm is alone liable."

We think that this limit of the infant's liability, which has been adopted by the legislature in the case of a minor being admitted by contract into a partnership business, ought to be adopted in such a case as the present. On principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager.

The elder brother Nobokisto has not appealed against Mr. Justice Macpherson's order, nor on the other hand have the plaintiffs appealed upon the ground that Nobokisto should have been made personally liable in the ordinary way.

We ought not, under ordinary circumstances, to make a decree which would have the effect of altering his liability, when neither he on the one hand nor the plaintiffs on the other have appealed against the decree in the Court below.

But under s. 337 of the Code of Civil Procedure (1) we are empowered, in a case like the present, to draw up what would be fair decree as regards both defendants.

We propose, therefore, to make an order, that unless the defendants admit partnership assets sufficient for the payment of the debt, there should be the usual decree for an account of the partnership property, and a direction that the debts be paid out of that property.

It will be the duty of the plaintiffs to serve Nobokisto with a copy of this judgment; and if within three weeks from the date of Nobokisto receiving a copy of this judgment neither the plaintiffs nor Nobokisto make any application to alter the terms of our proposed decree, the decree will be drawn up accordingly; but either party will be at liberty to apply within that time

The minor defendant is entitled to the costs of the appeal.

Decree varied.

Attorney for the appellant: Mr. *Dover*

Attorneys for the respondents: Messrs. *Swinhoe, Law & Co.*

(1) Act VIII of 1859, corresponding with Act X of 1877, s 541.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
April 30.

IN THE MATTER OF TROYLOKHANATH BISWAS AND RAM CHURN BISWAS (PETITIONERS).*

Inquiry into Cause of Death—Report by Magistrate—Privileged Communication—Judicial Proceeding—Finding—Coroner's Inquest—Criminal Procedure Code (Act X of 1872), *ss.* 127, 133, 135, 296—*Evidence Act* (I *of* 1872), *s.* 124.

Where the Magistrate of a division held an inquiry under s. 135 of the Criminal Procedure Code into the cause of the death of a person found dead under suspicious circumstances, and, without making a specific charge against any person, drew up a report embodying the result of his inquiry, and sent the report to the Magistrate of the district, and subsequently proceedings were taken against one of the witnesses, which ultimately resulted in an acquittal,—*Held* by the High Court, that there being nothing in the language of s. 135 requiring the Magistrate holding such an inquiry either to make a report or to come to a finding, the report actually sent could not be considered as part of a judicial proceeding, and that therefore the High Court had no power to send for it under s. 296 of the Criminal Procedure Code.

No analogy exists between a Coroner's Inquest and an inquiry into the cause of death under the Criminal Procedure Code.

IN this case, the facts of which are sufficiently stated in the judgment of Mr. Justice Markby, a rule had been obtained calling upon the Magistrate of Nuddea to show cause why he should not send up a certain report containing the results of an inquiry by Mr. Skrine, the Magistrate of the division, under s. 135 of the Criminal Procedure Code, into the death of one Ramgotti Biswas; and why, in the event of the Court holding the report to be a judicial proceeding, the proceedings should not be quashed under s. 297 of the Code.

The *Advocate-General* and Mr. *Kilby*, for the Magistrate of Nuddea, showed cause.—The question is entirely one of prin-

* Criminal Reference, No. 35 of 1878, from an order of H. B. Lawford, Esq., Sessions Judge of Nuddea, dated the 12th March 1878.

ciple. If such a document as this is to be considered as part of a judicial proceeding or record, subordinate officers will no longer be able to furnish confidential reports to their superiors. [MARKBY, J.—There are three points to be considered: (1) Whether, under s. 135 of the Criminal Procedure Code, it was imperative on Mr. Skrine to make a report? (2) Supposing that it was not imperative, still whether he was not at liberty to make one? (3) Whether this report was made under s. 135, or whether it was independent?] The law makes no provision for such a report as was made. There is not one word in s. 135 of the Criminal Procedure Code which says that the Magistrate is to put down in writing the conclusion at which he arrives. The omission is intentional. That appears from the provisions of ss. 127 and 133. These two sections provide for investigations and reports by police-officers. These reports have to be sent to the Magistrate of the district. Section 135, which relates to investigations by a Magistrate, does not require him to send in a report. Mr. Skrine acted under this section, and therefore, as he was not directed or required under the law to make a report, the report which he did make must have been made under rules of the service, and does not form part of the proceedings. The fourth section of the Criminal Procedure Code defines a judicial proceeding as "any proceeding in which any judgment, sentence, or final order is passed." It may be one which culminates in an order or not. This report is neither a judgment, sentence, nor final order. It is in the form of a letter to the Magistrate of Nuddea with certain appendices. These were sent up to the High Court for its assistance, as some portion of the letter is illegible. They form no part of the record. The character of the report is not judicial. There must be an intention in order to make a judicial report. This is a letter, and nothing more than a letter, to the Magistrate. [MARKBY, J.—Mr. Ghose in applying for the rule argued that the document spoke for itself and relied on the first line.] The last five paragraphs show that this was not a judgment, but was a private letter. That which may be evidence of a fact is not necessarily part of a record or judicial proceeding. Suppose a Magistrate tries a case summarily, he is

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IN THE MATTER OF TROYLOKHANATH BISWAS AND RAM CHURN BISWAS.

not bound to write a judgment, and no evidence is recorded. Suppose that the prisoner subsequently indicts a witness for perjury, the notes on counsel's brief made during the hearing before the Magistrate would not be a part of the record. There is no "case" under s. 297 of the Code. A "case" is a proceeding against some one. This report is not a proceeding. It cannot be said that there has been a "material error" in a judicial proceeding. Even supposing that Mr. Skrine had not written this report, no inquiry could be ordered, for the proceedings were purely optional; and there is nothing upon which the Court could pass any judgment, order, or sentence. The rule requires Mr. Stevens to show cause why these proceedings should not be quashed. What is there to quash? No one is affected by the proceedings. There is merely an opinion that cannot be quashed; there is no judgment, order, or sentence. Finally, this is a confidential letter from Mr. Skrine, both in form and matter. It recites things which had transpired, that does not make it a judicial proceeding. If the Court orders this report to be given up, it will be doing more in a criminal case then it could in a civil case. Suppose this to be a special appeal, would the report be considered as a letter or as a judgment? The Government think that this is a communication privileged under s. 124 of the Evidence Act. It cannot form part of the record. A record should be kept in the office of the Magistrate together with other records of proceedings. Letters of this kind belong to the executive department, not to the judicial.

Mr. *M. M. Ghose* and Mr. *Pauht* in support of the rule. As to the first question we submit that it is imperative on the Magistrate to come to a finding or report. Section 135 provides for two cases: the Magistrate may hold a judicial inquiry, and he may either stop the police or he may adopt their proceedings. [MARKBY, J.—Suppose a police-officer makes a report, must the Magistrate come to a finding?] If he makes an inquiry he must. The legislature could not have intended to allow a Magistrate who enters upon such an inquiry as this to decline to come to a finding. It cannot have intended to allow the proceedings to be abortive. Suppose a Magistrate in case after

case refused to come to a finding after taking evidence, would not the Court have power to make him? When a case is of such a description that the Magistrate would exercise power under the section, then the proceedings become of a judicial nature, and the High Court has jurisdiction to inquire into them. Here the Magistrate arrested persons, discharged them, made inquiries, and embodied the result in a document which he describes as his official report. This is a judicial document, for it was imperative on Mr. Skrine to come to a finding. Even if it was not imperatived, still the finding that he came to was judicial. True there are passages in the report which are not in the form of a judgment; but, taking it as a whole, it is judicial. Mr. Skrine never intended to treat it as confidential. [MARKBY, J.—On the question of intention, we should consider ourselves bound by Mr. Stevens's statement refusing to send up the report on the ground that it was confidential. Mr. Skrine's intention is immaterial.] I do not say that his intention is material. Mr. Stevens's opinion does not conclude the matter. His statement is a mere matter of opinion on his part, not a matter of fact within his knowledge. Where the law declares that proceedings shall be judicial, a mistake on the part of an officer does not alter their nature. Suppose a suit was brought against him, he could plead that he was acting in a judicial capacity and therefore protected. The form of the report will not help us in deciding this question. Some parts of it do not appear to be judicial, and it is in the form of a letter. But this is the only document which embodies the result of the inquiry; the fact that irrelevant matters are contained in it does not alter its character. It has been argued that the report was made by Mr. Skrine in his executive capacity. But Magistrates in deciding judicial questions have no executive functions, and there is nothing to make them police-officers; the distinctions are perfectly clear. All the Magistrate's powers are judicial, except some few which are declared by s 518 of the Criminal Procedure Code to be non-judicial. The word "judgment" is not defined in the Code. [PRINSEP, J.—Have you looked into chap. xxxiv of the Code?] That chapter merely says what the judgment in a trial is to contain. This report

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is a "proceeding" of which my clients would be entitled to a copy under s. 276, as they were "affected" by it. This section has been amended by Act. XI of 1874, which made it much wider. The report directs the prosecution of all the witnesses but two, and under that direction my clients were prosecuted. [PRINSEP, J.—The paragraph you refer to merely suggests the prosecution.] It would be a sanction. [PRINSEP, J.—To whom?] There would be a sufficient sanction to any one who liked to prosecute. It does not matter what this document is called, so long as it is judicial under the law. It may contain extraneous matter, there may be irregularities, but the judicial character is not taken away. It has been argued that counsels' notes in a summary trial would not form part of the record. But suppose that the Magistrate, though not bound to do so, takes down evidence, would not that be part of the record? and would he not be bound to produce it?

MARKBY, J.—The short facts of the case, so far as it is necessary to state them for the purpose of disposing of the present rule, are, that, on the 10th June last, a man named Ramgotti Biswas was found lying dead at no great distance from the factory of Lokenathpur. Under the circumstances in which he was found, I think that there was no possibility of doubt, or at any rate there was very good reason to suppose, that the man had either committed suicide or had been murdered. It was therefore a proper case for the institution of an inquiry under s. 135 of the Code of Criminal Procedure, and accordingly, as we must take it now, the Magistrate of the division proceeded to hold this inquiry. Those proceedings lasted a considerable time, and ultimately they were communicated to the Magistrate of the district. The final conclusion to which the Magistrate who held this inquiry came was, that the man had committed suicide, and that he had purposely committed suicide under such circumstances as might raise a suspicion that the factory people or some persons connected with the factory had caused his death. Subsequently some proceedings, which arose out of this enquiry, were taken against one of the petitioners now before us, and those proceedings went on appeal before the Sessions

Judge of Nuddea. The Sessions Judge of Nuddea acquitted the petitioner, but he desired to see the proceedings taken under s. 135, and he accordingly sent for those proceedings; but the Magistrate of the district in whose hands they were at that time, thinking that the proceedings under s. 135 were not judicial proceedings at all, declined to send them. The Sessions Judge of Nuddea reported the matter to this Court, and another Bench of this Court, after having heard the Legal Remembrancer on the subject, came to the conclusion that the proceedings taken by Mr. Skrine, the Magistrate who held the enquiry, were proceedings under s. 135, and that they were judicial proceedings. They did not, however, order the proceedings to be sent to the Sessions Judge of Nuddea, but sent for those proceedings themselves, and an order was issued that the record of the proceedings under s. 135 should be sent up to this Court. The Magistrate of Nuddea in answer to that order sent up certain papers but he intimated at the same time that he was in possession of a report by Mr. Skrine, and he informed this Court that he did not send that report as that was written by Mr. Skrine as a confidential report to him.

In that stage of the proceedings the case was transferred from the Bench which issued the original order to this Bench, and as the matter then stood, the only point for our consideration was whether or no the Magistrate of Nuddea was right in the view which he took,—*viz.*, that the report of Mr. Skrine did not form part of the proceedings under s. 135. In the meantime, however, before we came to any conclusion upon that, the present application was made, specially requesting that we should send for this report, and that, after obtaining that report, we should quash it.

Now a good many questions would have to be considered before granting such an application. There may be some doubt whether Troylokhanath Biswas, the only one of the petitioners who had ever been put upon his trial, having been acquitted, the petitioners had any *locus standi* at all. There may be considerable doubt, even putting all other questions out of the way, whether this Court would, at the instance of persons standing in the position of the petitioners, quash a finding under s. 135;

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and there is still a further objection taken by the Advocate-General, which is really not answered, *viz.*, that as the inquiry under that section is optional, this Court has no power to order fresh proceedings to be taken, and unless fresh proceedings can be taken, there is but little use in our interfering at all. But it is not necessary to go into these questions, for on another ground I think that this application must fail.

The reason why, notwithstanding these objections, we thought it desirable without further considering them that this rule should issue, was this:—It was absolutely necessary for us in the way the case came before us to consider whether the Magistrate of Nuddea had duly complied with the order of this Court. The proceedings having been sent for, the report was not sent, and I understand the course taken by Mr. Stevens to have been to submit to the decision of this Court, whether or no he was bound to send up that report. I may say in passing that the course so taken by Mr. Stevens shows that he acted with perfect propriety in the matter. But it was necessary to decide the question which he submitted to us quite independently of the present application. For my own part also I strongly desired to have the assistance of the advisors of the Crown in a discussion of this character. The question is of considerable importance, and one which may in some cases be of very serious consequence, whether the result of an inquiry under this section is such that, without the possibility of using any discretion in the matter, the Magistrate is bound to make it public. I therefore thought it desirable to issue a rule in order to bring in the Crown and have the question discussed. Accordingly we issued a rule in order to have the benefit of the argument of counsel for the Crown upon the construction of this section.

The matter has now been argued, and we have to determine what is the true construction of this section. But before I enter in that question I wish to say one word as to what I understand to be the object of the petitioners in this case. I may say at once that, if there was the slightest indication that there was an intention of opening up a charge against any individual whatsoever by these proceedings, I would not have been a party for a single moment to any discussion in the matter.

I would not by issuing a rule have given the least semblance of encouragement to such proceedings. But I fully understood Mr. Ghose from the first, as he has also represented now, that that is not the object of these proceedings. I understand the real object of these proceedings to be to clear the memory of the deceased man from an imputation which has undoubtedly been cast upon him. Whether we can arrive at that result under the law as it stands is a different matter; but I am bound to say that I consider that the object, if it can be attained by law, is a perfectly legitimate object. No one can doubt that it must be a matter of great pain to persons connected with this unfortunate man that this statement, *viz.*, that he had committed suicide under such circumstances as the Magistrate supposes, should have been made. It may, no doubt, sometimes be the duty of public officers to make statements which are painful to others, but there is nothing objectionable if persons affected by those statements try by any legal means in their power to get rid of those statements; and I go one step further, I think that the relatives of this deceased person were not rash in their inference, when they found a document of this kind printed and published, that it was intended to be put forth as the judicial result of a judicial inquiry. It commences thus: "From F. H. Skrine, Esq., Officiating Joint Magistrate on "special duty, to the Magistrate of Nuddea. I have the honor "to submit a report embodying the results of my enquiry into "the cause of the death of Ramgotti Biswas." Reasonably enough the way in which it struck them was that this was not merely an opinion of an individual formed upon the best materials that he could get together by any means in his power, and reported confidentially to his superior officer; but that it was an opinion of a judicial officer formed upon evidence and in a judicial manner. Although they were misled in supposing that it was a document of this nature, I think that they were very reasonably justified in assuming that it was so. I may also say that if this document had been of that character, and one therefore under our control, I should not have hesitated for a moment, if the law would allow me, in setting it aside. I think that it is of the utmost importance to keep a clear distinction between

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judicial and executive proceedings; and if this report was before me as a judicial proceeding, I should feel bound to say that it was a very unsatisfactory one. I think that it is impossible to read this document without seeing that this is not the result of an enquiry by Mr. Skrine himself, but of Mr. Skrine assisted by a variety of persons of inferior position. That might be a most useful thing for an ulterior object, but would not be an enquiry which ought to go forth to the world as a judicial proceeding by a Magistrate. I think it, therefore, right to say that if this had been a judicial proceeding, I should have treated it very differently from what I am now doing, and I hope that if it be once understoood that this is not a judicial proceeding, it will be deprived of very much of its injurious effect.

Now with regard to what is the more immediate subject for us now to consider. I am free to admit that, during the course of the argument, I have had some doubt as to what the intention of the legislature was when introducing this section. I think that it may be faily argued that *primâ facie* when a Magistrate holds a judicial inquiry and has power to take evidence, we should expect that it was intended that some result should be arrived at. But though that is so at first sight, I think, on further consideration, it is by no means clear, even upon a general view of the Act independently of the exact language of the section itself, that that was the intention of the legislature. The object of these inquiries may be three-fold. The object may be to calm any alarm that had been created in the mind of the public on the occurrence of a violent or unnatural death, and to allay any unfounded suspicion; or the object may be to put in force the law against a particular individual; or it may be merely to gain information to be used by the authorities according to their discretion. Now, looking at the general character of this section and the sections which procede it, I cannot myself see that merely for the purpose of putting the law in force against any particular individual, there was any necessity for the section at all. As far as I can see, the powers of a Magistrate under the law, if he suspects any person of having committed any particular offence, are ample without having any recourse to this section. Therefore the inquiry, or inquest as it is sometimes

called, must be to inform either the officers of Government or the public at large as to what has really occurred or is suspected to have occurred. Now I am by no means prepared to say that as a matter of policy, more would be gained than lost by the publication of the result of the inquiry. We may no doubt imagine cases in which it is very desirable that the result should be published, but we may also imagine cases in which it would be most injurious, even to private individuals, if the result were published. I only say this to show that I approach the consideration of the language of this section without being able to discern any strong reasons of policy in favour of either one construction or the other; and, therefore, though we may look to the policy of an Act as one of our guides in its construction, there is really nothing here to indicate what that policy is. The language of the section is this: "The nearest Magistrate duly authorized may hold an inquiry into the cause of any such death, either instead of or in addition to the investigation held by the police-officer; and if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence, although no specific charge has been made against any person. The Magistrate holding such an enquiry shall record the evidence taken upon it in any of the manners hereinafter prescribed according to the circumstances of the case." Now Mr. Ghose argued that the language of the section at once pointed to the provisions of s. 133, and that the inquiry held by the Magistrate was to be either supplemental to, or, if he thought proper, substituted for the inquiry held by a police-officer under s. 133, and he quite rightly indicated to us that under s. 133 a report is required, for that section says that the police-officer shall make an investigation and report the apparent cause of death, and so on. That argument which struck me at first seems to me to fail, because, whilst the police-officer necessarily has some superior to whom he can report, it is by no means always so with the Magistrate. The Magistrate of the district holding an enquiry under s. 135 has, under the Code of Criminal Procedure, no executive superior to whom he can report at all. It is not impossible for him to report to the Judge or to the Commissioner, or to Government; but I may say

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that it would be entirely out of the ordinary course of proceeding in this country if he were, judicially and not executively, to make a report either to one or to the other. At any rate, I feel sure that if it had been intended that the Magistrate should report judicially either to the Sessions Judge or to the Commissioner, or to Government, this would have been stated expressly in the Act.

Then Mr. Ghose says, that although the Magistrate is not bound to report, he must come to a finding. That also clearly was not the intention of the Legislature, because, under s. 133, although there is to be a report to the Magistrate, which is clearly not a finding, there is no person ordered to come to any finding at all I can see nothing which gives any support to the argument that if there is not to be a report, there must still be a finding as distinguished from a report. The language of the section does not require a report, nor does it require a finding; and it seems to me that if we were to say that, under this section, the Magistrate who holds an enquiry is bound to make a report or come to a finding, we should be making an unjustifiable addition to the language of the Legislature.

Some comparison has been made between a Coroner's enquiry and the enquiry under s. 135. As far as I can see, the only semblance of any basis for that comparison arises out of the word "inquest," which is used, not in s. 135, but in the earlier sections, where the Legislature apportions the various duties of Magistrates. I think that we ought not to introduce an analogy which does not really exist. The proceedings of a Coroner are in their nature regular criminal proceedings having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. I think also I am speaking correctly when I say that even in some cases where no particular person was effected, still the result of the verdict of a Coroner's jury might be to effect a forfeiture of property to the Crown. No doubt some of these results do not exist now and have fallen into disuse; but we must, I think, remember what the Coroner's inquest originally was when we are asked to consider why it results in a finding.

On the whole, therefore, I think that this rule ought to be discharged upon the ground that the report sent up by Mr. Skrine to the Magistrate of Nuddea was not part of a judicial proceeding.

PRINSEP, J.—I altogether agree in the view of the law in s. 135 of the Code of Criminal Procedure which has just been laid down by Mr. Justice Markby, and in holding that the report submitted by Mr. Skrine, the Magistrate of the Division of Chooadanga, to the District Magistrate, Mr. Stevens, is no part of any judicial proceedings held under that section. It seems to me quite clear that the form of an enquiry under s. 135 is directed more to elucidate the facts of a violent or unnatural death before there is any reasonable suspicion of the commission of any offence, and that when such grounds do exist, the enquiry comes under another portion of the Code.

As regards the form in which the present application is made to us, I must say that I have always entertained serious doubts as to the *locus standi* of the petitioners, and it was, as has already been stated in the judgment which has been just delivered, on account of the importance of deciding the position of the Magistrate with regard to this particular report and the proceedings taken by him that led me to agree in the course taken.

Whatever grounds the relations of the deceased may have to complain of the terms of the report in the form in which they produce it before us and the aspersions that it may cast on the memory of the deceased Ramgotti Biswas, I think that the observation of the learned Advocate-General in the course of his argument completely disposes of any objection that they may take to the terms in which that report mentions Ramgotti. That report was never published, until through some injudicious agitation of the friends or advisers of the petitioners a pressure was brought to bear on the Government, which induced the latter to consent to the publication of that report in the expurgated form in which it has been laid before us. Had this course not been taken on behalf of the petitioners, that report would never have been published c been made known except to the officials immediately concerned. We have no power to

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quash that report as we are asked to do, nor has it been suggested that any good result would ensue in the ends of justice by any re-opening of the enquiry, since it is admitted that nothing is forthcoming or likely to be elicited which would throw any fresh light on the circumstances attending the death of Ramgotti Biswas.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878 *April* 30

SUFFERUDDIN *v* IBRAHIM *

Jurisdiction—Bench of Magistrates—Criminal Procedure Code (Act X of 1872), ss 50, 530

A Bench of Magistrates has no power to deal with cases coming under s. 530 of the Criminal Procedure Code. A Bench may be empowered under s. 50 of the Code "to try such cases or such class of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers to trials for offences, and these do not come within the miscellaneous matters mentioned in s. 530.

THE reference in this case was as follows:—

"There is a dispute between Ibrahim and Sufferuddin concerning the possession of some lands. The former claims the land as being in his own cultivation as his howlah lands subordinate to the brahmatur tenure of Gobinda Chandra Banerjee in Kismut Kistokate. The latter sets up a *burga* right (1), and claims to be in direct possession. Subsequently, on the application of Ibrahim, the Magistrate of the district took up the matter under s. 530 of the Criminal Procedure Code, and made the case over for trial to Baboo Trailokhya Nath Sen, Deputy Magistrate exercising second-class powers, with directions to try it in the Bench over which he presided with first-class powers. The Bench, consisting of the Deputy Magistrate with the Honorary Magistrate, Baboo Chundra Nath Sen, took the case up and examined all the witnesses on behalf of Sufferuddin and two of the important witnesses on behalf of Ibrahim. But at a later stage, a Bench, consisting of the same Deputy Magistrate

* Criminal Reference, No. 26 of 1878, by H. C. Sutherland, Esq., Sessions Judge of Backergunge, dated the 16th April 1878.

(1) Tenure for which rent is paid in kind

and another Honorary Magistrate, Moulvie Mohamed Fazil, examined the rest of the witnesses, finally disposed of the case, and directed that Ibrahim should retain possession of the land until ousted by due course of law.

"It is first urged in this case that the evidence has been improperly received, inasmuch as the witnesses were heard, some by one Bench, and others by another Bench of Magistrates. It appears from the record that the witnesses for the second party were all examined by a Bench consisting of the Deputy Magistrate with an Honorary Magistrate, Baboo Chundra Nath Sen, who also examined two of the most important witnessess,—*viz.*, Shita Nath and Nobin, to prove relinquishment on behalf of the first party. At a later stage of the case three witnesses were examined for the first party by a Bench consisting of the same Deputy Magistrate and an Honorary Magistrate, Moulvie Mohamed Fazil, and that the final order was passed by this last Bench of Magistrates. Now this proceeding is altogether illegal, Moulvie Mohamed Fazil, who decided the case, knew nothing whatever of the case for the second party, and his knowledge of the case for the first party was very imperfect.

"It is next urged that there is no evidence to support the order This, I think, is pretty clear from the Deputy Magistrate's explanation, who says that more stress was laid on the Sub-Inspector's report than on the evidence of the witnesses. The Sub-Inspector's report is no evidence at all. Had he been examined, it would have been a very different thing altogether.

"I think that the order ought not to stand, and under the circumstances stated above, recommend that it be set aside."

PRINSEP, J.—In addition to the reasons stated by the Sessions Judge, we are of opinion that it was not competent to a Bench of Magistrates to deal with a case under s. 530. A Bench may be empowered under s. 50 "to try such cases or such classes of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers only to trials for offences, and not to miscellaneous matters such as those coming within s. 530. So that in this view of the law also the order passed was illegal: it is accordingly set aside

Before Mr. Justice Markby and Mr. Justice Prinsep.

1878
April 30.

IN THE MATTER OF CHUMMAN SHAH AND ANOTHER.*

Confession—Attestation when unnecessary—Criminal Procedure Code (Act X of 1872), *ss.* 324, 346.

The attestation required by s. 346 of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.

THE only question in this case was whether a conviction of a prisoner by a Deputy Magistrate, based mainly upon a confession made by the prisoner in Court to such Deputy Magistrate, ought to be quashed on the ground that the record of the confession had not been attested as required by s. 346 of the Criminal Procedure Code.

The Deputy Magistrate had convicted the prisoner under s. 411 of the Indian Penal Code, and sentenced him to one year's rigorous imprisonment.

The Sessions Judge doubted whether this conviction could stand, and referred the matter to the High Court, which ruled as follows:

PRINSEP, J. (MARKBY, J., concurring).—It was unnecessary for the Magistrate to record any "confession" of Chumman Shah, since he was competent on the admission of Chumman to sentence him without any further record (s. 324, Code of Criminal Procedure).

* Criminal Reference by F. Cowley, Esq., Officiating Sessions Judge of Monghyr, dated the 24th April 1878.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

THE EMPRESS *v.* NURUL HUQQ AND ANOTHER.*

1878
June 24.

Recognizance—Power of High Court to interfere when forfeited.

The High Court has no power to reduce the amount of recognizances which have been forfeited, but in a case of hardship the matter should be referred to Government.

IN this case Nurul Huqq and Bissember Mitter were, in April 1877, bound under penalties of Rs. 700 each to keep the peace for a year. On the 31st December 1877 they were convicted by the Assistant Magistrate of Khoolna of committing mischief in respect of some cocoanuts, and sentenced to a fine of Rs. 20 each. This sentence was confirmed by the Officiating Magistrate of Jessore on appeal.

On the 2nd of May 1878 the Assistant Magistrate of Khoolna ordered that the penalty (Rs. 700) mentioned in their security-bond should be realized. The Magistrate, to whom an appeal against this order was made, was of opinion that, considering the position of the defendants, who were peons in the cutcherry of a zemindar and earning probably not more than Rs. 7 or 8 a month, a penalty of Rs. 700 each in the form of forfeited security in addition to the fine in the case of mischief was far heavier than was necessary, and reported the proceedings for the orders of the High Court under s. 296 of Act X of 1872.

Upon this reference the following order was made by

AINSLIE, J.—In the case of *Nilmadhub Ghosal* (1) a Bench of this Court held that we have no power to reduce the amount of recognizances which have been forfeited. The Bombay High Court has expressed the same opinion.

The papers must be returned. The Officiating Magistrate should refer the matter to Government, if he thinks the amount of the recognizances was excessive.

* Criminal Reference, No. P132 of 1878, from an order of W. H. Page, Esq., Officiating Magistrate of Jessore, dated the 18th June 1878.

(1) 19 W. R., Cr. Rul., 1.

Before Mr. Justice Ainslie and Mr Justice White

1878
June 5.

THE EMPRESS *v.* THE MUNICIPAL CORPORATION OF THE TOWN OF CALCUTTA.*

Reference—Municipal Commissioners—Public Servant—Act IV of 1877 (*Presidency Magistrates' Act*), *ss.* 39, 240—*Indian Penal Code, ss.* 11, 21, *Descrip.* 10, *Illus* 1.

A Municipal Corporation is not a public servant within the meaning of s. 39 of Act IV of 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.

THE Corporation of the Town of Calcutta was indicted, at the instance of Osmond Beeby and others, under ss. 268, 269, 270, and 290 of the Indian Penal Code, for keeping a night-soil depôt in such proximity to the houses of the complainants in the neighbourhood of Shureef Duftree's Lane in the Town of Calcutta as to cause a public nuisance.

On the day fixed for the hearing, the Chief Magistrate doubted whether he could entertain the charge, inasmuch as he considered the Municipal Commissioners to be public servants, and as such privileged from prosecution, except under the sanction of the Government as provided for by s. 39 of the Presedency Magistrates' Act.

He thereupon, under s. 240 of the same Act, referred the point for the opinion of the High Court, and gave in his letter of reference the following reasons for his views:—

1*st*.—Section 39 of Act IV of 1877 provides that no public servant who is not removable from his office without the sanction of Government shall be prosecuted for any act purporting to be done by him in the discharge of his duty *without the previous sanction of Government*.

2*nd*—That the illustration to s 21 of the Penal Code declares that a Municipal Commissioner is a public servant; and under

* Reference, No. 177 of 1878, from J. G. Charles, Esq, Officiating Chief Magistrate of Calcutta, dated 29th May 1878.

s. 11 of the same Code the word person is said to include a body of persons.

3rd.—And that therefore a Municipal Corporation as a body was entitled to the same privileges as the individual Municipal Commissioners who composed it.

Mr. *Phillips* for the complainants.—Section 39 does not apply to the present case. In the first place, the sanction only applies where Government has some control over the dismissal of a public servant from his office. Here the Government has no such control, the Corporation of Calcutta being a body created by the Legislature, holding no office, and consequently incapable of being dismissed therefrom, and only capable of extinction by an Act of the Legislature. It was never intended that when Government had no means of affording redress by sanctioning the dismissal of the offender, it should have the power of prohibiting a prosecution. This point is entirely overlooked by the Magistrate.

In the second place the Corporation is not a public servant; the Magistrate infers that the Corporation is a public servant, but he does not profess to find that it comes within any of the clauses of the definition of a public servant in s. 21 of the Penal Code. His reasoning appears to be, that as a single Municipal Commissioner is a public servant, therefore the whole body of Municipal Commissioners must be public servants; and as he considers the Corporation to be the equivalent to the whole body of existing Municipal Commissioners, he holds that the Corporation is a public servant: he also, without adverting to the point above noticed, holds that if a single Municipal Commissioner is protected from prosecution, the whole body must be equally protected.

Now the Corporation is not the same as the whole body of existing members; it is a thing distinct from all its existing members, and includes all past and future members; hence nothing can be inferred as to its being a public servant from the fact that all its members are so. Again, there is the same fallacy in the Magistrate's further reasoning that the Corporation must be protected, if all its members are. The individual member requires

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such protection, for he may be made to suffer in person and pocket; but a corporation cannot be imprisoned, nor can its members be made to suffer individually; it can only be reached by distraining its property or be made to pay out of its corporate funds.

The very nature of a corporation is, therefore, a sufficient protection, and the ground for the Magistrate's inference is thus cut away. Besides, such a protection as is afforded by s. 39 of the Presidency Magistrates' Act being against common right is not to be extended by inference.

Mr. *Piffard* on behalf of the Corporation.

AINSLIE, J.—The question referred by the Presidency Magistrate is, whether the protection extended by s. 39 of Act IV of 1877 to certain individual public servants extends equally to a Municipal Corporation prosecuted under the Indian Penal Code for being guilty of a public nuisance.

By s. 11 of the Penal Code, the word "person" is defined to include a body of persons whether incorporated or not; and therefore the word "person" in s. 21 may be read as a body of persons incorporated. The words "public servants" in that section may consequently denote a body of persons incorporated falling under any of the descriptions given therein It is not necessary to refer to any except the tenth. The illustration in the tenth description says that a Municipal Commissioner is a public servant; but it does not therefore follow that a Corporation such as that created by Act IV of 1876 (B.C.) is also a public servant within the meaning of that section.

The words "every officer" in the 10th clause seem rather to point to an individual than to an incorporated body: but assuming, for the purposes of this reference, that the Municipal Corporation of Calcutta is a public servant within the meaning of s. 21 of the Penal Code, still it seems to me that it does not come within the provision of s. 39 of the Presidency Magistrates' Act. By that Act no such Judge or public servant as is described in that section shall, unless with the previous sanction of Government, be prosecuted for any act purporting

to be done by him in the discharge of his duty. The class of public servants referred to consists of those who are "not removable from office whithout the sanction of Government." It appears to me that this description must be read in its entirety, and that the words "not removable from office" cannot be separated from the following words "without the sanction of Government."

But if the whole be read as describing the class exempted from prosecution except with the previous sanction of Government, the description can only be applied to a class not removable from office at all by dropping the words "without the sanction of Government," which have no meaning as applied to such public servants.

The right to prosecute any person, or body of persons, by whom one may have been injured, is a common right which can only be limited by special legislation; and in considering whether the right has been taken away, we must see that it is taken away by express words, or by necessary implication. It does not seem to me that it must necessarily be implied that, by the words "not removable from office without the sanction of Government," it was the intention of the Legislature to include those who are not removable from office under any circumstance at all.

I see no reason to suppose that the Government must have meant to extend the same protection to a body, such as the Municipal Corporation of Calcutta, which cannot be taken under a warrant, or sentenced to imprisonment, which it thought fit to extend to certain individuals in the service of that Corporation, who no doubt are protected by s. 32 of the Calcutta Municipal Act and s. 39 of the Presidency Magistrates' Act.

The answer which I would therefore give to the question referred to us by the Magistrate is, that the protection does not extend to a Municipal Corporation prosecuted under the Indian Penal Code.

WHITE, J.—I am of the same opinion. The question submitted to us by the Presidency Magistrate turns entirely upon the meaning and true construction of s. 39 of the Presidency Magistrates' Act.

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It is not disputed, nor could it be disputed, that unless that section applies to the Corporation of the Town of Calcutta, it is liable under the Penal Code to be prosecuted for a nuisance in the same way as if the offence had been committed by an ordinary individual. A corporation may be proceeded against criminally, as well for a misfeasance as for a nonfeasance—*Reg.* v. *The Birmingham and Gloucester Railway Company* (1), *Reg* v. *Scott* (2), *and Reg.* v. *The Great North of England Railway Company* (3).

Section 39, as regards a Judge or any public servant not removable from office without the sanction of the Government, exempts them from prosecution for an offence except with the previous sanction of the Government. The word "Government," as used in the section, means the Government acting in its executive capacity. It is contended that the Calcutta Corporation falls within the category of a public servant not removable without the sanction of the Government. I think it is open to much doubt whether the Corporation, as distinct from its individual members, is a public servant at all, as these words are defined by the 21st section of the Penal Code, which is incorporated with the 39th section of the Act under consideration. Assuming, however, for the purpose of the argument, that that point is decided in favour of the defendants' contention, it seems to me clear that the Calcutta Corporation does not come within the description of a public servant irremovable from office without the sanction of Government.

The Corporation is created by Act IV of 1876 (B.C). By the 4th section of that Act certain persons, to the number of 72, who are styled Commissioners, and of whom 48 are elected by the rate-payers and 24 appointed by the Government, are incorporated by the name of the Corporation of the Town of Calcutta. The Corporation is to have perpetual succession, a common seal, and by its corporate name to sue and be sued.

There is no provision in the Act for putting an end to the Corporation, or for removing or dismissing it, either with or

(1) 3 Q. B. Rep, 223. (2) 3 Q B Rep, 547.
(3) 9 Q. B. Rep., 315.

without the sanction of Government, which means, as I have said, the Executive Government.

It can only cease to exist by an Act of the Legislature, and until and unless the Legislature interferes its corporate life must continue. The words "public servant not removable without the sanction of Government" are wholly inappropriate to describe the legal position of such a corporation.

Again, if it were necessary to go beyond the Corporation and consider the position of the 72 members comprising it, they appear to be equally without the particular description of public servant mentioned in s. 39 of the Presidency Magistrates' Act.

By s. 22 they are elected for a term of three years, and continue in office during that term. Section 23 enumerates the circumstances under which, and the only circumstances under which, they cease to be members of the Corporation. Those circumstances are death, resignation, or disqualification; the disqualification being that which may arise from their becoming bankrupt or interested in a contract with the Corporation, or being absent from Calcutta for six consecutive months, or being sentenced to a term of imprisonment; so that looking behind the Corporation, if I may so say, to the members who constitute it, it cannot be said of them, any more than of the Corporation, that they are persons who are not removable without the sanction of Government.

Mr. Piffard has argued that the words in s. 39, which we are now considering, are intended to embrace two classes of public servants,—(1) those who are not removable from office at all, and (2) those who are removable only with the sanction of Government. But I am unable to agree with him that that is the true construction of the words in question.

They appear to me to point to one class, and one class only, of public servants, *viz.*, that class which is removable only with the sanction of Government. The words are satisfied by applying them to that class, and whereas, here a privilege is created in favour of certain persons, the meaning of the words creating the privilege should not be extended beyond their plain and natural sense. Mr. Piffard's contention would require us to construe the section as if its language had been "any public servant not

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EMPRESS v. MUNICIPAL CORPORATION OF THE TOWN OF CALCUTTA.

removable from his office, or if removable, not removable without the sanction of Government."

In fact, to warrant the construction contended for, some additional words would have to be introduced, and this circumstance, I think, is fatal to the argument.

I agree with my brother Ainslie, that if we look to the reason of the privilege conferred by the 39th section, there is a marked distinction between the case of a public servant whose removal required the sanction of Government, and that of a corporation in the position of the Calcutta Municipality. The Government may have an interest in protecting the former from prosecution without their previous sanction, but no interest in protecting the latter from the consequences of their own acts; moreover, the Corporation if convicted cannot be punished by imprisonment, but only by fine. The Legislature must have thought it a matter of importance that no public servant whose removal requires the sanction of Government should be subjected to imprisonment without its sanction, but the same reasons for requiring Government sanction do not apply when the result would be merely the infliction of a fine, which must ultimately be paid by the rate-payers of the Town of Calcutta.

I concur, therefore, in the opinion that the question which has been submitted to us by the Presidency Magistrate must be answered in the negative.

Before Mr. Justice R. C Mitter and Mr. Justice Maclean.

THE EMPRESS *v.* MOHIM CHUNDER RAI AND ANOTHER.*

1878
May 10

Assessors—Trial by Jury of a case properly triable with Assessors—Appeal on facts—Act VIII of 1871, *s.* 80—*Criminal Procedure Code* (*Act X of* 1872), *s.* 233.

Per MACLEAN, J. (MITTER, J., *dubitante*).—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.

IN this case the petitioners, who had been charged with an offence under s. 80 of Act VIII of 1871, had been tried by the Sessions Judge of the 24-Pargannas with the aid of a jury, and convicted.

Baboo *Boido Nath Dutt*, for the petitioners, contended, among other things, that the petitioners having been tried and convicted of an offence to which trial by jury had not been made applicable by the Government notification of January 1862 (*Calcutta Gazette*), and who ought, therefore, to have been tried by the Judge with the aid of assessors, such trial and conviction was, under the circumstances, invalid, and, if not, the accused were entitled to an appeal upon facts in the same way as they would have been if their trial had been conducted in the manner prescribed by law.

The Government Pleader Baboo *Juggadanund Mookerjee contra.*

The following judgments were delivered by the Court, which, however, confirmed the sentences passed upon the prisoners, being of opinion that the lower Court's decision upon the facts was correct.

* Criminal Appeal, No. 182 of 1878, against the order of W. H. Verner, Esq., Officiating Additional Sessions Judge, 24-Pargannas, dated the 14th February 1878.

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EMPRESS v. MOHIM CHUNDER RAI.

MACLEAN, J.—The appellants have been convicted by the Sessions Court of the 24-Pargannas of an offence under the Registration Act, VIII of 1871, and as the trial was held with a jury, the petition of appeal filed on 13th April was directed to show certain errors of law, such as defects in the Judge's charge to the jury. By a subsequent petition of 17th April, the prisoners claim to be heard against the conviction on questions of fact as well as law, as the offence of which they have been convicted is not one of those to which trial by jury has been made applicable by the Government notification of January 1862 (*Calcutta Gazette*, 8th January 1862, p. 87).

It has been contended before us by the Government Pleader that the Sessions Judge was competent to try the prisoners with a jury notwithstanding that the offence charged is not included in the Government notification referred to, and therefore the prisoners are not entitled to appeal against their conviction except upon matter of law; but it is not necessary for the purposes of this appeal to decide that question. The trial by a jury of an offence triable with assessors is not invalid on that ground (s. 233, Criminal Procedure Code—Explanation); but it appears to me that the prisoners, who would have been entitled to an appeal on the facts, if the case had been tried with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoner's right of appeal. . . . . .

Dealing, however, with this appeal as an appeal upon the facts, I consider the conviction of the prisoners a proper one, and I would dismiss the appeal.

MITTER, J.—I concur; but I do not desire to express any opinion as to whether the prisoners are entitled to appeal on questions of fact. But assuming that they have this right, I concur with my learned colleague that the conviction of the prisoners is fully supported by the evidence. We accordingly dismiss the appeal.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, and Mr. Justice Ainslie.

ANONYMOUS.*

1878
June 16.

Vakalatnama—Act VII of 1870, *art.* 10, *sched. ii—Act XVIII of* 1869, *sched. ii.*

A vakalatnama authorizing a pleader to receive during the course of a suit which he has been empowered to conduct money or documents receivable by his client in the ordinary course of such suit, or in consequence of the order or decree of the Court in such suit, does not require a stamp under Act XVIII of 1869.

REFERENCE made to the High Court by the Officiating Secretary to the Board of Revenue, North-Western Provinces, under s. 41 of Act XVIII of 1869.

The question referred was as follows:—

Whether a Court of Justice would, ordinarily, be acting regularly in directing a public officer to pay money or make over valuable documents to a pleader who has been empowered to conduct a case by a vakalatnama stamped under art. 10, sched. ii of the Court Fees Act, but who has not been authorized by a power-of-attorney bearing the stamp prescribed in sched. ii of Act XVIII of 1869 to receive on behalf of his client such money or valuable documents.

No one appeared to argue the point.

The opinion of the Court was delivered by

GARTH, C.J.—Upon the question addressed to this Court by the Board of Revenue of the North-Western Provinces on the 29th of March last, we are of opinion that if a pleader is authorized by the vakalatnama under which he acts to receive monies or documents for his client in the course of the cause, which he is empowered to conduct, or as a consequence of the decree or any order of the Court in such cause, a Court of Justice might

* Reference from the Board of Revenue, North-Western Provinces, under 41 of Act XVIII of 1869.

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ANONYMOUS.

legally and with propriety direct a public officer to pay money or make over valuable documents to the pleader, provided that such money or documents have become receivable by the client in the ordinary course of the suit, or in consequence of the order or decree.

The receipt of money or documents under such circumstances is one of those ordinary duties which pleaders are continually called upon to perform for their clients, and a vakalatnama properly framed generally contains a power to perform such duties.

If, therefore, the Legislature had intended that in every such case a general or special power-of-attorney should be necessary to enable the pleader to receive the money or documents, it may be assumed that they would have said so in express terms.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1878
April 25.

MOHIMA CHUNDER DEY SIRCAR AND OTHERS (DEFENDANTS) v. HURRO LALL SIRCAR AND OTHERS (PLAINTIFFS).*

Limitation—Title—Possession—Acts of Ownership—Evidence of Title—Grant of Potta.

Where land, the right to which is disputed, has been uninhabited and uncultivated, and no acts of ownership by any person can be proved to have been exercised over it, it is often necessary, for the purpose of deciding the question of limitation, to rely upon slight evidence of possession, and sometimes possession of the adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession.

But where the land has been occupied, it is generally proper, for purposes of limitation, to deal with the question of possession as distinct from the question of title, for while the title may be in one person, a twelve years' possession may have barred that title.

THIS was a suit for the possession of 1 biga 7 cottas of land which the plaintiffs claimed as appertaining to their osut talook, situated in talook Ramgobind Aitch, which again was said to be situated in Parganna Simlabad. The plaintiffs alleged that they had let the land in howla to certain of the defendants, but

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 7th of December 1877, in Special Appeal No. 499 of 1877.

that the principal defendant ousted them in Magh 1281 ; that the howladars brought a suit for possession of the land, but that their suit having been dismissed, they gave up possession of the land to the plaintiffs. The defendants pleaded limitation, and stated that the land appertained to a different estate. The Munsif made a decree in favour of the plaintiffs establishing their right to the lands in dispute. This decree was reversed by the First Subordinate Judge, but was affirmed on appeal to the High Court by Ainslie, J.

From this last decision the defendants appealed under s. 15 of the Letters Patent to the High Court.

Baboo *Boikonto Nath Doss* for the appellants.

Baboos *Kali Mohun Doss* and *Doorga Mohun Doss* for the respondents.

GARTH, C.J.—We think that there is no sufficient ground in this case for adopting the judgment of the Munsif to the exclusion altogether of that of the Subordinate Judge.

Assuming that the latter has committed an error of law, it appears to us to amount to this, that he has failed to attribute proper weight to the potta which has been produced by the plaintiffs ; and that neither he, nor the Munsif, has dealt quite properly with the plea of limitation.

These errors, we think, would only afford a ground for remanding the case to the lower Court for reconsideration ; and we, therefore, propose to take that course, with the following remarks :

The question of limitation, as it seems to us, has not been sufficiently distinguished in either of the lower Courts from the question of title. In some cases, as for instance where grants or leases have been made of waste or jungle lands, and the right to those lands is disputed, it is often impossible to give evidence of acts of ownership or possession over the property because it is uninhabited and uncultivated, and no acts of ownership by any one have been exercised over it. In such cases it is often necessary, for the purpose of deciding the question

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of limitation, to rely upon very slight evidence of possession, and sometimes possession of the adjoining land, coupled with evidence of title, such as grants or leases, and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession.

But in a case like the present, where the land in question appears to have been occupied, it is generally proper to deal with the question of possession, for purposes of limitation, as distinct from the question of title. It very frequently happens that the title to land is admitted to be in one person, whilst a twelve years' possession by another person has barred that title ; and in this case it may well be that the potta under which the plaintiffs claim is a perfectly genuine instrument ; but that the defendants or their tenants have, by adverse possession for twelve years, excluded the plaintiffs from their right.

If the land in question is capable of occupation and has been actually occupied, as we presume to be the case, the question of limitation may and ought to be dealt with separately from the question of title.

Then, again, in dealing with the question of title, it must be borne in mind that the potta of 1821, although proved to be genuine, would, as against the principal defendants, be no evidence, unless it were shown that the plaintiffs or their predecessors in title, at some time or other since 1821, had been in possession under it.

The potta is merely a lease granted by the owners of an estate to the plaintiffs' ancestors of a piece of ground including the land in dispute ; but this grant would be no evidence of title to that land as against the owners of an adjoining estate, unless possession under it were proved : coupled with possession the potta would add great strength to the plaintiffs' evidence.

Then, as regards the proof of the potta, if it can be shown to have been for thirty years in the custody of the plaintiffs or their predecessors in title, and was produced by them at the trial, the Court might presume that it was duly executed by the person or persons who professed to have done so : and the fact that it was produced in the former suit in 1848 would be

evidence of its authenticity, although *per se* no evidence of title as against the defendants.

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From these remarks it will appear that the evidence of the plaintiffs' possession ought carefully to be investigated and weighed, both on the question of title and also on that of limitation.

The Subordinate Judge, if he thinks fit, may receive further evidence of possession on either side. The costs in all the Courts will follow the result of the trial on remand.

Case remanded.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch

HEM LOTTA (PLAINTIFF) *v.* SREEDHONE BOROOA AND ANOTHER EN*

1877 *Nov.* 27

Certificate Proceedings under Beng. Act VII of 1868—*Jurisdiction of Civil Court to enquire into legality of—Grant of Potta after Certificate. issued.*

In a suit for arrears of rent it appeared that the plaintiff claimed under a potta granted by the owner of land, after a certificate had been issued against him out of a Collector's office under Beng. Act VII of 1868. The defendants had purchased the land in question at a sale held under the Act. The plaintiff alleged that the certificate had not been served, and that no notice before the certificate was issued was served upon the grantor as required by s. 18 of the Act. And he contended that as the Collector's proceedings were irregular, the potta was valid. The District Judge held that the Civil Court had no power to inquire into the Collector's proceedings, and must, as nothing appeared to the contrary, assume that they were regular, and dismissed, the suit.

Held, that the Judge was bound to examine the proceedings of the Collector to see that they were legal and regular so as to constitute a legal bar to the grant of the potta, and that the Judge was not at liberty to make any presumption in favour of their legality or correctness.

THIS was a suit to recover arrears of rent. The plaintiff alleged that she held possession of the land out of which the rent issued, by virtue of a patni granted by one Doorga Mohun Kanaye. The potta was granted subsequently to the issue out

* Appeal under s 15 of the Letters Patent, against the decree of Mr Justice Lawford, dated the 26th July 1887, in Special Appeal No. 2636 of 1876.

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of a Collector's office of a certificate under Beng. Act VII of 1868 against the grantor. The defendants purchased the land in question at the sale held under the Act, and now pleaded that Doorga Mohun Kanaye had no power to grant the potta after the certificate had been served. The witnesses called to prove service of the certificate were disbelieved by the Munsif, and it also appeared at the trial before him that no notice was served upon Doorga Mohun Kanaye under s 18 of the Act before the certificate was issued. Under these circumstances the Munsif held that the potta was good, and gave the plaintiff a decree. Upon appeal the District Judge considered that a Civil Court could not say that the procedure followed by the Collector was irregular, and that the entire proceedings were null and void, and must, as nothing appeared to the contrary, assume that they were regular, and that if the parties were aggrieved, they could try the correctness of the Collector's proceedings by a regular suit; and reversed the Munsif's decision. This decree was upheld on appeal to the High Court by Mr. Justice Lawford. The plaintiff now appealed under s. 15 of the Letters Patant.

Baboo *Mohini Mohun Roy* for the appellant.

Baboo *Srinath Doss* for the respondents.

GARTH, C.J. (BIRCH, J, concurring).—We think that the District Judge has made a mistake in this case, which the learned Judge in this Court has not thought fit to rectify.

The District Judge appears to have considered, for some reason or other, that it was not competent for the Civil Court to question the validity of the proceedings of the Collector.

The question arose in this way—

The plaintiff claimed rent from the defendant by virtue of a patni which had been granted to her by Doorga Mohun, and under which Doorga Mohun's rights as the defendant's landlord had been conveyed to him (the plaintiff).

The defendant's case was that the patni was invalid, because Doorga Mohun had no right to grant it.

Now, *primâ facie*, Doorga Mohun had of course a right by law to grant the patni. But the defendants alleged that certain proceedings had been taken by the Collector, the legal

effect of which was to prevent Doorga Mohun from transferring his interest in the tenure; which proceedings consisted of a certificate, which was intended to operate as a judgment against Doorga Mohun, and a notice given to him of the issue of that certificate.

Now it was absolutely necessary, in order to answer the plaintiff's case effectually, that the defendants should prove these proceedings in a regular way; and it is clear that the plaintiff was at liberty, if she could, to question the legality of those proceedings, and to show that they were irregular and ineffectual.

But the Judge says: "This Court cannot say that the procedure followed by the Collector was irregular, and that the entire proceedings are null and void;" and further on he says, "I hold that this Court cannot in this suit examine the proceedings of the Collector under Act VII, and must, as nothing appears to the contrary, assume that they were regular."

In this we think that the Judge was clearly wrong. He was bound to examine the proceedings of the Collector; he was bound to see that they were legal and regular, so as to constitute a legal bar to Doorga Mohun's transferring his interest to the plaintiff; and the Judge was not at liberty to make any presumption in favour of their legality or correctness.

The case must go back to the Judge to try the question of the legality of the Collector's proceedings. The Munsif tried this question, and it will be for the Judge now to ascertain whether the proceedings were regular and effectual so as to prevent the transfer of the tenure by Doorga Mohun to the plaintiff.

If necessary, additional evidence may be given by either party for the purpose of determining that question.

The judgment of this Court and of the District Judge will be reversed, and the case will be remanded to the District Judge for retrial in accordance with the views expressed.

If further evidence is necessary, the Judge can give the parties an opportunity of adducing it. The costs will abide the result.

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1878
May 1.

TIRTHANUND THAKOOR (PLAINTIFF) *v.* MUTTY LALL MISSER (DEFENDANT).*

Transfer of a portion of Occupancy Holding—Custom—Right of Zemindar—Ejectment.

The existence of a custom in a particular district by which rights of occupancy in such district are transferable will not justify the holder of such a right of occupancy in subdividing his tenure, and transfering different parts of it to different persons; and in case of such transfer the zemindar is entitled to treat the transferees as trespassers, and eject them.

THIS was a suit by the zemindar of certain lands to eject the defendant from a certain jote. The lands in suit originally formed a moiety of a tenure held under occupancy rights by one Pursajha, who sold them to the defendant. The Court of first instance, finding as a fact that occupancy rights were transferable according to the custom of the district in which the lands in question were situate, dismissed the suit. This decision was reversed by the lower Appellate Court without going into the evidence in the case, on the preliminary ground, that even admitting that the alleged custom which authorised the transfer of occupancy rights had been well proved, still such custom could not be taken to extend the right to transfer portions of an occupancy holding without the consent of the zemindar.

The defendant preferred a special appeal to the High Court, which was heard by Birch, J., sitting alone, the value of the property in suit not exceeding Rs. 50. The learned Judge remanded the case for a decision on the evidence, being of opinion that the sale of half the jote did not necessarily work a forfeiture of the rights of the original occupancy ryot, and that the remedy of the zemindar lay rather against such occupancy ryot, and not against his transferee.

The plaintiff thereupon preferred an appeal under s. 15 of the Letters Patent.

Baboo *Taruck Nath Dutt* for the appellant.

Baboo *Nil Madhub Sen* for the respondent.

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Birch, dated the 11th of February 1878, in special Appeal No. 1272 of 1877.

GARTH, C.J. (McDONELL, J., concurring).—We have not the least doubt about this case; and the time of the Court has been unnecessarily occupied by the respondent's pleader attempting to urge a point, which has been decided against him by the learned Judge of this Court, and against which decision he has not thought fit to appeal.

The only question is, whether it is necessary or proper that there should be a remand; and the appeal is made to us upon the ground that the learned Judge was wrong in ordering a remand, when it had not been proved that there was any right by custom in the defendant, the occupancy tenant to divide his tenure and transfer it to different persons.

An issue was raised distinctly by the Munsif, at the instance of the defendant, whether an occupancy ryot had a right by custom to transfer his tenure to different persons.

The Munsif found that occupancy ryots had a right in that locality to transfer their tenures generally. Whether he was justified, upon the evidence, in arriving at that conclusion, appears very doubtful. But assuming him to have been right in that finding, he did not go on to find, nor was there a particle of evidence upon which he could properly find, that an occupancy ryot had a right to divide his tenure and to transfer different parts of it to different people.

Under these circumstances, the defendant, who took, and who professed to take a portion of the tenure under a transfer of this kind, was a mere trespasser.

It has been suggested that the original tenant would under such circumstances remain liable for the rent. But the original tenant has not paid any rent since the transfer; and when a suit was brought against him, he repudiated the tenure, and said that he had transferred it to different persons, of whom the defendant is one. If then the tenant could not transfer the tenure by custom, the zemindar had a right to treat the defendant as a trespasser and to eject him.

The District Judge has come to a just conclusion, and we think that, under the circumstances, it would not be proper to remand the case. The judgment of Mr. Justice Birch will,

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therefore, be reversed, and the judgment of the District Judge will stand.

The appellant ought to have his costs of both hearings in this Court.

Appeal decreed.

Before Mr. Justice Ainslie and Mr. Justice Lawford.

1877 *Sept.* 14.

RAM LALL SINGH AND OTHERS (DEFENDANTS) *v.* LILL DHARY MUHTON (PLAINTIFF).*

Maintenance of Bunds—Prescriptive Right—Escape of Water—Injury to Neighbouring Properties—Vis Major.

Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major.*

THIS was a suit brought by a ryot of one village against the owner of another for damages caused by the penning back of water, on the ground that the plaintiff had a right to cut the bund of the defendants under certain circumstances, and that the defendants wrongfully restrained him from exercising that right, whereby his (the plaintiff's) lands became submerged, and thereby caused him damage.

The defence set up was, first, that the complaint ought to come from the proprietor, and not from individual ryots of the estate; and, secondly, that the bund was one which the defendants had, for a long series of years, maintained for irrigation purposes; that they had acquired a prescriptive right to maintain it; that it was unchanged; and that there was no right in the plaintiff to cut it down at any time.

It was proved by the evidence that the bund was a long-established one, and it was not said that any change in its condition had been recently made. Evidence was offered by the plaintiff that he had, for two continuous years, entered and cut the bund, but this the Munsif disbelieved.

* Special Appeals, Nos. 618, 619, 620, 621, 622, and 623, of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 22nd of December 1876, reversing the decree of Moulvi Abdool Azeez, Munsif of Behar, dated the 29th of July 1876.

On the 29th July 1876 the Munsif decided that the bund had been long established, and that there had been no change in its condition; that the plaintiff had entirely failed to prove his right to cut the bund, and even a right to regulate its height; and accordingly dismissed the plaintiff's suit. On this the plaintiff appealed to the District Judge, who reversed the Munsif's decision. Whereupon the defendants appealed specially to the High Court.

Mr. *Branson* (with him Mr. *M. L. Sandel* and Baboo *Chunder Madhub Ghose*) for the appellant contended that the defendants had acquired a right to interfere with the natural stream in the nature of an easement, and claimed a prescriptive right to such easement: Gale on Easements, ss. 202, 203. Further, that the right of penning back the waters of a natural stream so as to overflow the land of the higher riparian proprietors might be acquired by prescription—Angell on Water-courses, s. 372; the extent of the right being determined by user commensurate with the actual enjoyment—Angell on Water-courses, ss. 379, 380; that the defendants claimed nothing further than their original right to maintain the bund at its original height; *Steles* v. *Hooker* (1). The learned Counsel further, on the authority of the *Madras Railway Company* v. *The Zemindars of Carvatenagarum* (2) and *Nichols* v. *Marsland* (3), argued that the defendants could not be held responsible for the overflowing of the water-courses by the acts of others, or caused by any unforeseen circumstances, as was the case in the present suit; and that it was for the person who complained of the bund being detrimental to his interest to show a prescriptive right to come in and interfere with it.

Mr. *Piffard* (with him Moonshee *Mahomed Yussuf*) for the respondent contended that the respondent had a prescriptive right to regulate the height of the bund; and, moreover, that it was an interference with the flow of the stream above his lands to such an extent as to injure them and entitle him to bring a suit for damages, or to enter and abate the nuisance: Blackstone's Commentaries, Vol. III. That the case of the *Mad-*

(1) 7 Cowen, 266. (2) L. R., 1 In. App., 364. (3) 2. L. R., Ex. D., 1.

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RAM LALL SINGH v. LILL DHARY MUHTON.

ras Railway Company v. *The Zemindars of Carvatenagarum* (1) did not apply, inasmuch as that case related to artificial reservoirs, whereas the present case dealt with a natural stream; and the question of right to be decided, therefore, here related, not to the owner of an artificial reservoir, but to the riparian proprietors—Broome's Commentary, p 83, 3rd edition; and that the respondent having given evidence in the Munsif's Court that the bund had been for two continuous years cut by him, the defendants, if they ever possessed a prescriptive right to maintain the bund, had lost it; and cited *Chumroo Singh* v. *Mullick Khyrut Ahmed* (2) as showing that, unless the defendants could prove a prescriptive right, they had no right to interfere with the flow of the water to the injury of others.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the facts of the case, continued):—There is no evidence to show that, by agreement or otherwise, the accumulation of water is limited to a certain quantity; and that when the water rises to a given height, the defendants, or the plaintiff, or the plaintiff's zemindar, is bound or entitled to open a passage for the escape of the surplus.

The Munsif found that the plaintiff had entirely failed to prove any right to cut the bund: and we must say that, in our opinion, it would require very strong evidence to establish such a claim as that put forward here, not on the part of the zemindar acting on behalf of the cultivators of his estate, but on behalf of each individual ryot according to his own judgment, to cut down the bund of a neighbouring zemindar, seeing that it is well known that the consequence of so doing would be that, when the water once begins to flow over the bund, the bund must give way, and the accumulation of water, which is absolutely necessary for the cultivation of land, must be lost.

The Judge has gone off from the facts of the case, and has based his judgment upon a construction of law derived entirely from English text-books. Now, the law as laid down in English text-books is, no doubt, a very useful guide; but it must not be

(1) L. R., 2 Ex. D., 1.

(2) 18 W. R., 525.

taken to override the customs of this country—customs arising from the extreme necessity of preserving water and thereby preserving the means of cultivating large tracts of land which would otherwise lie waste.

In the present case we have a long-established bund unchanged in its condition with certain outlets for excess water. *Primâ facie* the defendants have a right to maintain the bund in its usual condition, and the right of the plaintiff to cut that bund down is one which we think must be proved most unmistakeably. The Judge does not go upon proof at all, but merely upon his view of the law. Now, that view of the law, as it will presently appear, cannot be supported.

The case of the *Madras Railway Company* v. *The Zemindar of Carvatenagarum* (1), decided by the Privy Council, was a case the converse of the present. It was for damage done by the bursting of an artificial reservoir. The principle, however, is the same. Their Lordships there held that storing of water in this country is an act of necessity; that it was not for the benefit of the proprietor of the land only, but also in order to enable a large body of cultivators to live by the cultivation of that land. They further held that the damage which was caused by an unusual flood and the consequent bursting of the embankment of the tank by which the railway was washed away was not one for which the owner of the tank could be charged.

In addition to this, there is a recent case, *Nichols* v. *Marsland* (2). This was a case perhaps much stronger in point, because it was not even a case in which water was preserved for the benefit of a large section of the public, but merely for the pleasure of a particular owner, who had formed an ornamental piece of water by embanking a stream passing through her own lands, and then through the lands of the plaintiff. Eventually on an unusually heavy storm occurring, and a great rush of water coming into this reservoir, the banks proved insufficient to support the pressure, and the lands of the plaintiff, which lay lower down the stream, were injured in consequence. It was held there by the Court of Appeal that the case was distinguished from that of *Rylands* v. *Fletcher* (3)—also cited in the Madras case before the Privy Council in 1 Indian Appeals, page

(1) L. R., 1 In. Ap., 364. (2) L. R., 2 Ex. D., 1. (3) L. R., 3 H. L., 330.

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364—in this, that it is not the act of the defendant in keeping this reservoir, an act in itself lawful, which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful. It is the supervening *vis major* of the water caused by the flood, which, superadded to the water in the reservoir (which of itself would have been innocuous) causes the disaster.

They also came to the conclusion that, as the jury had found that all reasonable precaution had been taken, the defendant was not responsible for the damage done.

This case seems to us to apply distinctly to the present. It appears from the judgment of the Judge that the damage in the present instance was caused by an unusual inundation, which he describes as bringing down four times the ordinary quantity of water. It must be taken that the damage was caused by the act of God, and not by the act of the defendants, who are not shown to have failed in making provision for properly dealing with such quantities of water as might reasonably be expected to accumulate.

The suit must therefore be dismissed. We reverse the judgment of the Judge and restore that of the Munsif with costs.

Special Appeals, Nos. 619 to 623, will be governed by this judgment.

*Appeal dismissed.**

* A rule for a review of judgment was obtained by the appellants on 12th January 1878, on the ground that plaintiff had a prescriptive right to regulate the height of the bund; that although the Munsif disbelieved the evidence, there was still a regular appeal open to the petitioner upon the facts and law, and he did so appeal, and the Judge's decision was in his favour. If, therefore, the lower Appellate Court had, according to its view of the law, failed to pronounce an opinion on such evidence, that, although a good reason for remand, was no reason for the dismissal of the plaintiff's suit.

The rule came on for hearing on 15th April (Mr. Branson appearing to show cause against the rule; Mr. J. D. Bell in support of it), and was discharged on 17th April 1878, the Court (Ainslie, J.) being of opinion that the defendants' right to maintain the bund had been proved; and that, inasmuch as the plaintiff had not attempted to go into evidence on the point of the plaintiff having regulated the height of the bund, in the lower Appellate Court, and as there had been no finding on this point, and he had accepted the evidence as found by the first Court, and was content with the lower Appellate Court's decision on the law in his favour, and took no objection to the evidence of no finding on this point in special appeal, and did not file a cross-appeal, the case could not be remanded now to enable him to do so.

Rule dismissed.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

LAL SAHOO (DEFENDANT) *v.* DEO NARAIN SINGH AND ANOTHER (PLAINTIFFS).*

1878 *March* 25.

Holdings not liable to Enhancement (Guzastha Kasht)—Suit for removal of Buildings—Occupancy Rights not transferable—Beng. Act VIII of 1869, *ss.* 3, 4, 6.

The statutory right of occupancy under Beng. Act VIII of 1869 cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although the Court in such cases will be disposed to place a liberal interpretation on the rights of the tenant, it will not sanction a complete change in the mode of enjoyment.

IN this suit the plaintiffs, as owners of the land, sued the defendants to enforce the removal of the foundations of a certain house and to abstain from further building thereon. The plot of ground on which these foundations were laid was alleged to have been originally held, together with other lands, by the second defendant, Nuro Panday, from the plaintiffs, as a *guzastha kasht,—i.e.*, a holding on a rent not liable to enhancement. On the 21st September 1875 the second defendant sold to the first defendant that portion of the holding upon which the first defendant had begun the erection of a building, the subject of the present suit. The defendants contended that, according to the custom of the village, the sale by the second defendant passed to the first defendant the same rights in the land as those previously enjoyed by the vendor; and that the first defendant could, therefore, erect the building on the land without the consent of the superior landlord. The Court of first instance gave the plaintiffs a decree, finding on the facts that the rights possessed by the second defendant in the lands held by him from the plaintiffs were only those of an occupancy ryot; and, failing proof that according to the custom of the

* Special Appeals, Nos. 965 and 966 of 1877, against the decree of Moulvie Mahomed Moval Hossain, Subordinate Judge of Shahabad, dated 23rd February 1877, affirming the decree of Moulvi Adeeloodeen, Sudder Munsif of Arrah, dated 1st July 1876.

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village such occupancy rights were transferable, declared the sale to the first defendant invalid. It would appear that the witnesses for the defence left the Court without permission, and had not been examined. No steps were taken to bring them back for examination, but the Munsif instituted proceedings against them in the Criminal Court. On appeal the lower Appellate Court, affirming the decision of the Court below, held, that, even assuming that the second defendant possessed any transferable occupancy rights, he, as a mere cultivator, could not either himself build, or transfer to the first defendant the right to erect a house on any part of the land comprised in his holding. *Juggut Chunder Roy Chowdhry* v. *Eshan Chunder Banerjee* (1) was quoted in support of this view. It also found that no custom authorizing the transfer of occupancy rights without the consent of the landlord had been established, and that the defendant's complaint before it that his witnesses who would have proved the custom of alienating occupany rights had not been examined, was immaterial in the view it took of the matter. The defendant, accordingly, presented this special appeal to the High Court.

Mr. *Evans* (with him Baboo *Mohesh Chunder Chowdhry*) for the appellant.

Baboos *Hem Chunder Banerjee* and *Kalikishen Sen* for the respondents.

Mr. *Evans*.—The plaintiffs simply sought to restrain the first defendant from building a house on land in his possession, and as ejectment was not sought, no question as to the rights of transfer in Nuro Panday could be considered in this suit. The judgment of the Court should have proceeded on the sole question whether or not the plaintiffs were likely to sustain damage by the erection of the house on the defendant's land. The case of *Juggut Chunder Roy Chowdhry* v. *Eshan Chunder Banerjee* (1) was remanded for decision on this very point. An opportunity was not afforded to the defendants to examine all the witnesses summoned on their behalf.

(1) 24 W. R., 220.

Baboo *Hem Chunder Banerjee.*—It is not denied that the defendant bases his title on Beng. Act VIII of 1869. The operation of this Act is confined solely to agricultural holdings; it may, therefore, be taken that, in letting the lands, the plaintiffs only intended them to be used for purposes of cultivation.

The judgment of the Court was delivered by

AINSLIE, J. (who, after stating the nature of the suit and the finding of the Court of first instance, continued):—On appeal the Subordinate Judge affirmed the finding that the holding is not protected from enhancement, and also held that no custom of transfer of occupancy rights without the consent of the landlord had been established. This last finding is irrelevant, as ejectment is not sought. He went on to hold that Nuro Panday had no right to build, and consequently could give no such right to his vendee. He assumes it to be an established rule that a lessee cannot build on land held by him for cultivation, and supports this view by a reference to the case of *Jugut Chunder Roy Chowdhry* v. *Eshan Chunder Banerjee* (1). In that judgment the Court said: "It may well be that, in particular places, ryots having rights of occupancy in land for agricultural purposes may, by custom, have the right to transfer it to any person to hold for the same purpose; but that will not carry with it the proposition that a person who may be desirous of erecting a large house in the midst of an agricultural mohal, can buy up the tenures and rights of several cultivators and convert the land which they formerly occupied into a dwelling-house and appurtenances." These observations, however, are qualified by what follows. The Court did not dispose of the case simply on this view of the law, but remanded it for enquiry, among other things, whether any and what express injury resulted to the plaintiff from the acts complained of. It must, however, be borne in mind that, in this case, the defendant was co-sharer in the estate.

(1) 24 W. R., 230.

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It is complained that the Subordinate Judge ought not to have affirmed the decree in favour of the plaintiff without enquiring whether any injury would result to the plaintiffs from the building commenced by the defendant, and without allowing him to give further evidence to establish the *guzasth* rights of Nuro Panday. (The learned Judge having referred to the defendant's witnesses not being examined, and the Subordinate Judge's finding thereon, continued) Reference has been made by the respondent to what is called the *issumnavisee* of witnesses. This, I think, is of no importance. A party is not tied down to any particular line of enquiry indicated in a list of his witnesses, but the facts that his complaint to the lower Appellate Court was based on the exclusion of evidence on a particular point is sufficient to tie him down to that point in special appeal.

As to the other objection, I think we must hold that a ryot who relies upon an occupancy right must be taken as thereby admitting that the letting was of such a character as is contemplated in Beng. Act VIII of 1869; and it has been held that this law only applies to agricultural holdings. If then we take it that the land was let on the understanding that it was to be used for cultivation, the fact the ryot has acquired a right of occupancy does not alter any of the terms of the letting, except the conditions (if any) fixing a term for the tenancy.

The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted, and although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment.

The appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

RAM TARRUN KOONDOO (PLAINTIFF) *v.* HOSSEIN BUKSH (DEFENDANT).*

1878 *April* 5.

Causes of Action, Joinder of—Splitting Demands—Amendment—Relinquishment—Act VIII of 1859, *s.* 7—*Act X of* 1877, *s.* 43.

Where a plaintiff originally sued for a certain sum upon his khatta-books, and an objection was taken by the defendant that he ought to have sued upon a certain hatchitta, whereupon the plaintiff amended his plaint by suing for the amount admittedly due upon the hatchitta, in addition to the amount he claimed upon his khatta-books,—*Held*, that when the plaintiff amended his plaint by suing upon the hatchitta, his causes of action, which, when the suit was originally framed, were distinct, became united, that there was no "relinquishment" in the original suit within the terms of Act VIII of 1859, s 7 (with which s. 43, Act X of 1877, corresponds), and that the plaint was rightly amended.

Mohummud Zahoor Ali Khan v. *Thakooranee Rutta Koer* (1) followed.

THIS was originally a suit for the recovery of the sum of Rs. 650-12, brought in the Court of the Munsif of Sealdah, on account of the price of khesaree due on a khatta-book balance. The plaintiff also brought another suit in the Sealdah Small Cause Court to recover the sum of Rs. 164 on account of the balance of the price of grain sold by him to the defendant. The defendant in the Small Cause Court objected that the suit instituted there could not proceed, inasmuch as he had given a hatchitta to the plaintiff, which would show that the two accounts were not separate, but were one account, and that there was a splitting up of the cause of action. The Judge of the Small Cause Court held the objection to be valid, and struck off the case under Act VIII of 1859, s. 7. Thereupon the plaintiff filed a supplemental plaint in the Munsif's Court enhancing his claim by Rs. 164. The defendant pleaded that the plaintiff having at first omitted to sue for this sum could not include it in the present suit. This plea

* Special Appeal, No. 777 of 1877, against the decree of Baboo Kishto Mohun Mookerjee, Officiating Second Subordinate Judge of the 24-Pargannas, dated the 6th of April 1877, modifying the decree of Baboo Dwarka Nath Mitter, Munsif of Sealdah, dated the 19th February 1877.

(1) 11 Moo. I. A., 468.

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was overruled by the Munsif, who gave the plaintiff a decree for the whole amount claimed. On appeal the Subordinate Judge, considering that the plaintiff's claim as regarded the Rs. 164 was barred by s. 7 of Act VIII of 1859, modified the order of the lower Court, and gave the plaintiff a decree for Rs. 650-12. From this decree the plaintiff appealed to the High Court.

Baboo *Doorga Doss Dutt* for the appellant.

Baboo *Golap Chunder Sirkar* for the respondent.

MARKBY, J.—It is impossible to distinguish this case from the decision in *Mohummud Zahoor Ali Khan* v. *Thakooranee Rutta Koer* (1). There the suit, as originally brought against nine persons, was held by the Privy Council to have been wholly misconceived; but they, nevertheless, thought that there was in all probability a good cause of action against one of those defendants upon a bond, and thereupon they make this order. They say: "they have come to the conclusion that the fairer course is to do what the Judge of the Court of first instance might, under the Code of Procedure, have done at an earlier stage of the cause,—namely, allow the appellant to amend his plaint so as to make it a plaint against Rutta Koer alone for the recovery of money due on a bond." That is precisely what has been done here. The plaintiff originally sued upon his khatta-books. There was an objection by the defendant that the plaintiff ought not to have sued upon his khatta-books, but that he ought to have sued upon the hatchitta. Whether that was a valid objection or not, we need not now consider, nor need we consider whether it was that objection which induced the plaintiff to take the course he did. What he did was this, he asked the Court to be allowed to sue upon the hatchitta. The Munsif, as he was clearly entitled to do under the authority of the decision I have referred to, allowed the suit to proceed upon the hatchitta, and the Subordinate Judge was wrong when he expressed an opinion that the Munsif was prevented from doing this by the provisions of s. 7 of the Procedure Code

(1) 11 Moo. I. A., 468.

Section 7 applies to a totally different state of things, and in no way prevents the Munsif from making this order.

The judgment of the lower Appellate Court must, therefore, be set aside, and that of the Munsif restored. The case will stand decreed upon the hatchitta for the sum of 814 rupees and 12 annas. The special appellant will get his costs of this appeal and of the Courts below.

PRINSEP, J.—The error of the Subordinate Judge seems to have been caused by his taking the causes of action to have been irrevocably united by the execution of the hatchitta; as the suit was originally laid, the causes of action were distinct. When, however, the plaintiff sued on the hatchitta, they became united, and therefore, as the suit was originally laid, there was no relinquishment within the terms of s. 7 of the Code of Civil Procedure as has been held by the Subordinate Judge.

Appeal allowed.

Before Mr. Justice McDonell and Mr. Justice Broughton.

KHOOB LALL AND ANOTHER (DEFENDANTS) *v.* JUNGLE SINGH (PLAINTIFF).*

1878 *May* 13.

Insufficiently stamped Document—Act XVIII of 1869, *s.* 20—*Admission by Court—No Right of Appeal.*

The question of the admissibility of an insufficiently stamped document once admitted as evidence by a Court can form no valid ground of appeal. *Enayetoolah* v. *Shaik Meajan* (1) followed.

The plaintiff, the present respondent, brought a suit to recover Rs. 999-5-9 on a *teep* executed by the defendants on the 5th Kartick 1283 F.S. (17th October 1875).

The defendants objected to the *teep* being received in evidence as being insufficiently stamped, and further denied its execution. The lower Court held that the *teep* was not a promissory note, but a letter of agreement as defined by art. 11,

* Special Appeal, No. 1691 of 1877, against the decree of R. J. Richardson, Esq., Judge of Zilla Tirhoot, dated the 2nd of May 1877, affirming the decree of Baboo Dwarka Nath Bhattacharjee, Munsif of Mozufferpore, dated the 16th of September 1876.

(1) 16 W. R., 6.

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sched. ii of Act XVIII of 1869, and admitted the document in evidence on payment of the penalty prescribed by s. 20 of Act XVIII of 1869. The question as to execution of the document was decided against the defendants.

The defendants appealed, and the Judge upheld the decision of the lower Court. Thereupon the defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and *Chunder Madhub Ghose* for the respondent, on the case being called on, took the preliminary objection that the appeal would not lie, inasmuch as the document was received in evidence in the first Court, and having once been received its admissibility could not afterwards be questioned on appeal. They referred to *Enayetoolah* v. *Shaikh Meajan* (1), *Roy Luchmeepat Singh* v. *Shaikh Moshurruff Ali* (2), *Currie* v. *Chatty* (3), *Lalljee Singh* v. *Akran Ser* (4), and *Shoudaminee Dossee* v. *Ram Roodro Gangooly* (5); and contended that whether the document was a promissory note or an agreement would make no difference in the case.

Mr. *C. Gregory* for the appellant.—The instrument in question is a promissory note as defined by cl. 25, s. 3 of Act XVIII of 1869, and being insufficiently stamped ought not to have been received in evidence, and being a promissory note, s. 20 of Act XVIII of 1869 was inapplicable.

McDONELL, J. (BROUGHTON, J., concurring)—The plaintiff sued to recover 994 rupees 5 annas 9 pie principal, with interest under a *teep* executed by the defendants. Both the lower Courts have decreed the plaintiff's claim. In special appeal it is urged that the Courts below should have held that the *teep* on which the plaintiff relies is a promissory note and being insufficiently stamped as such is inadmissible in evidence.

On the appeal being taken up a preliminary objection was raised that no appeal lies in this case, inasmuch as where a document is admitted by the first Court as not requiring a stamp, its inadmissibility cannot be questioned in appeal. Various

(1) 16 W., R., 6.
(2) 25 W. R., 80.
(3) 11 W. R., 520.
(4) 12 W. R., 47.
(5) 8 W. R., 367.

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rulings of these Court have been cited in support of this objection; and it appears to us that the ruling in *Enayetoolah* v. *Shaikh Meajan* (1) is on all fours with the present case. Therefore, following that ruling, we hold that the preliminary objection must prevail.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

GOPEE MOHUN MOZOOMDAR (PLAINTIFF) *v.* HILLS (DEFENDANT)*

1878 *March.* 21.

Res judicata—Suit for Rent.

The plaintiff sued the defendant in the year 1873 for arrears of rent at a certain rate per biga. The defendant pleaded that the land had been held by him at a uniform rent for more than twenty years, and this contention was supported by the Court. The plaintiff then gave the defendant notice of enhancement, and sued to recover rent for two years at the rate stated by the defendant, and for one year at an increased rate. To this suit the defendant raised substantially the same defence. *Held*, that the decision in the previous suit was not a bar to the present suit, their being two questions for consideration—one, whether there had been a uniform payment of rent for twenty years, and, if so, whether the presumption, which the law directs to be drawn from a uniform payment of rent for twenty years, had been rebutted by the plaintiff; neither of which questions were concluded by the previous decision.

THE plaintiff in the year 1873 sued the defendant for arrear of rent due on a certain jote, alleging that it was an ootbundee tenure, and that the defendant was liable to pay rent at the rate of Re. 1 for every biga found by measurement annually. The defendant, among other things, pleaded that the jote was a kaimee tenure, and held by him at a uniform rent of Rs. 16 for more than twenty years, and this contention was supported by the Court. The plaintiff then gave the defendant notice of enhancement for increase of area found by measurement and holding below the prevailing rates, and now sued to recover rent for two years at the rate of Rs. 16, and for one year at an

* Special Appeal, No. 1915 of 1877, against the decree of A. J. R. Bainbridge, Esq., Judge of Zilla Moorshedabad, dated the 5th of June 1877, affirming the decree of Baboo Bepro Dass Chatterjee, Munsif of Azeemgunge, dated the 15th March 1877.

(1) 16 W. R., 6.

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increased rate upon a larger area. The defendant made substantially the same defence as in the previous suit. The Court of first instance decided that the judgment in the first suit was no bar to the institution of the second suit, and held on the facts that the plaintiff had failed to establish a right to enhancement of rent for the year claimed, but gave the plaintiff a decree for arrears of rent for the three years at the rate of rent which, according to the admission of the defendant, the land had hitherto been liable. The lower Appellate Court reversed the decision, on the ground that the present suit was *res judicata*. The plaintiff appealed to the High Court.

Baboo *Gooroodas Banerjee* for the appellant.

Baboo *Bipro Das Mookerjee* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—We think that there must be a remand in this case. There were two questions for consideration: one was whether there had been a uniform payment of rent for twenty years, and, if so, whether the presumption which the law directs to be drawn from a uniform payment of rent for twenty years had been rebutted by the plaintiff The previous decision is not conclusive upon either of these two points. One of these questions was not and could not be gone into in the previous suit. It has nothing whatever to do with the former case whether the landlord received different rates of rent at some earlier period. No doubt the Court in that former case did express an opinion that, for twenty years, rent had been paid at a uniform rate; but even that was not a question in issue in the former suit, and in such a manner as to make the decision in the former suit conclusive upon that point. The District Judge will have to consider the case upon the evidence on the record, and determine whether or not he agrees with the Munsif, who has found in favour of the defendant that this is a tenure the rent of which cannot be enhanced.

Case remanded.

Before Mr. Justice R C. Mitter and Mr. Justice Maclean.

BROJENDRO COOMAR RAY AND OTHERS (PLAINTIFFS) *v.* RAKHAL CHUNDER RAY AND OTHERS (DEFENDANTS).*

1878. *May* 23.

Limitation—Arrears of Rent—Pendency of Enhancement Suit—Beng. Act VIII of 1869, *s.* 29.

A sued for enhancement of rent of certain lands for a specified year. On the dismissal of this suit *A*, more than five years after the rent fell due, sued for arrears of rent for the same year. *Held*, that *A* was not entitled to deduct the time occupied in the conduct of his enhancement suit from the period which elapsed since the rent first fell due in order to bring his case within the period of limitation prescribed for such last-mentioned suits by s. 29 of Beng. Act VIII of 1869.

THIS was a suit for arrears of rent for the year 1276, B.S. (1869-1870). The plaint was filed on the 19th January 1876, and alleged that the plaintiffs had previously, on the 24th Assar 1277, B. S. (7th July 1870), sued the defendants for arrears of rent for the same lands and the same year (1869-1870), but at an enhanced rate; and that such suit had been finally dismissed by the High Court on the 2nd of June 1873, on the ground that the notice given by the plaintiff was illegal. On these facts the plaintiffs contended that the ordinary law of limitation did not apply, and that in calculating the period of limitation he was entitled to exclude the period during which his enhancement suit was pending. The defendants pleaded limitation, and denied the plaintiffs' right to make any such deduction.

The Court of first instance, on the principle alleged to have been laid down by the following decided cases—*Ranee Surnomoyee* v. *Shoshee Mokee Burmonia* (1), *Eshan Chunder Roy* v. *Khajah Assanoolah* (2), *Dindayal Paramanik* v. *Radha Kishori Debi* (3), *Mohesh Chunder Chakladar* v. *Gungamonee Dossee* (4), *Huronath Nath Roy* (*Chowdhry* v. *Goluck Nath Chowdhry* (5)—

* Special Appeal, No. 2189 of 1876, against the decree of Baboo Bhugwan Chunder Sen, Subordinate Judge of Zilla Backergunge, dated the 26th July 1876, reversing the decree of Baboo Kadar Nath Mozumdar, Third Munsif of Barisal, dated the 24th April 1676.

(1) 11 W. R., P. C., 5.
(2) 16 W. R., 79.
(3) 8 B. L. R., 536; S. C., 17 W. R., 415.
(4) 18 W. R., 59.
(5) 19 W. R., 18.

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was of opinion that the plaintiffs' suit was not barred by limitation, and gave them a decree for the amount claimed. The lower Appellate Court reversed the decision of the Court below on the ground that the plaintiffs' to enhancement suit in no way affected their right to sue for arrears of rent. Such suit might have been brought at any time within the period fixed by s. 29 of Beng. Act VIII of 1869. The plaintiffs having failed to do this, their suit was barred, and the plaintiffs thereupon appealed to the High Court.

Baboo *Doorga Mohun Dass* and Baboo *Sreenath Dass* for the appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Kali Mohun Dass* for the respondents.

The judgment of the Court was delivered by

MITTER, J.—In this case we think that the lower Appellate Court has taken a correct view of the law of limitation applicable to the facts about which there is no dispute between the parties.

The rent claimed is of the year 1276 (1869-1870), and the present suit has been brought in Magh 1282 (January 1876), so that if the rent claimed became due in the year 1276 (1869-1870), the present suit not having been brought within there years from the last day of that year, is clearly barred under s. 29 of the Rent Act.

It has been said that it did not become due in that year because in 1275 (1868-1869) a notice for enhancing the rent of the defendants' tenure was issued, and a suit for the recovery of enhanced rent mentioned in the aforesaid notice was brought in Assar 1277 (July 1870); that this suit was finally decided against the plaintiffs by the High Court on the 19th Jaist 1280 (2nd June 1873). The plaintiffs' contention is, that the rent of the year 1276 (1869-1870) at the old admitted rate became due on the dismissal of the enhancement suit. We do not think that this contention is correct. It is clear that, notwithstanding the notice of enhancement, the plaintiffs, if they chose to do so, could have successfully sued the defendants in

the year 1277 (1870), and recovered the rent claimed in this suit. Therefore, it follows that the rent claimed in this case became due in 1876 (1869-1870).

The decision of the lower Appellate Court is correct, and the special appeal is accordingly dismissed with costs.

Appeal dismissed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

PETAMBAR BABOO AND ANOTHER (PLAINTIFFS) *v.* NILMONY SINGH DEO AND OTHERS (DEFENDANTS.*)

1878
April 16.

Limitation—Grant in lieu of Maintenance—Right to resume.

Although a grant of a mokurrari lease in lieu of maintenance may be resumable by the grantor and his heirs, yet, if the grantor or any of his successors receives distinct notice of a claim on the part of the grantee to hold in perpetuity and not subject to resumption, and allows twelve years to go by without contesting such claims, he (such grantor or successor) will be barred for the time of his own enjoyment.

THIS was a suit instituted by the plaintiff as talookdar of Belouja, Pargunna Khaspul, under the defendant Nilmony Singh, Raja of Chuckla Panchkote, to recover khas possession of Mouza Kururya, in Parganna Khaspul, from the defendants (other than the defendant Nilmony Singh). These defendants alleged that a permanent mokurrari settlement of the entire Mouza Kururya had been granted long ago at a fixed annual rental, not subject to abatement or enhancement, to their great-grandfather, Anunta Lal Sekur Baboo, by the then Raja of Chuckla Panchkote, who was his brother-in-law (wife's sister's husband); that this grant had been confirmed to their grandfather, Shohun Sekur Baboo, by a sanad given about the year 1802 by the then Raja of Chuckla Panchkote; that they and their predecessors had ever since remained in possession of Mouza Kururya upon the terms of the original grant; and that the suit of the plaintiff was now barred by limitation. The defendant Nilmony Singh supported the claim of the plaintiff, and pleaded that the grant to the ancestor of the other defendants

* Regular Appeal, No. 157 of 1875, against a decree of Major E. Y. Walcott, Assistant Commissioner of Zilla Manbhoom, dated 13th March 1876.

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having been a grant in lieu of maintenance was, like all grants in lieu of maintenance, resumable at the will and pleasure of the Raja of Chuckla Panchkote. In support of the defendants' plea of limitation evidence was given that, in a suit instituted some time previous to the 3rd of August 1862, by the then talookdar of the village against these defendants, these defendants had succeeded in making out their right to hold the mouza as a mokurrari holding at the annual rent of Rs. 132, and no more. It also appeared that on failing to obtain an enhancement of the rent payable by these defendants, the then talookdar had, on the 3rd of August 1862, sued the then Raja of Chuckla Panchkote, upon the ground that the then defendants having set up and proved their right to hold the mouza at a mokurrari rent of Rs. 132, his (the Raja's) assurances in respect of the gross rental of the talook had proved unfounded to that extent, and that the talookdar was consequently entitled to a corresponding reduction of the talook rent paid by him; and that the talookdar had succeeded in this suit. The Court of first instance made a decree in favour of the plaintiff, being of opinion that the allegation of the defendants in the suit between them and the talookdar that their holding was a mokurrari one was not necessarily a setting up of a title adverse to the Raja, as the word *korposh* or maintenance, was superadded to whatever was said about mokurrari so as to leave it to be supposed that the tenure was only mokurrari because the tenure was a maintenance grant. It might be "mokurrari" and "kaimi" so long as the grant in lieu of maintenance continued, and yet came to an end on the resumption of the grant. From this decree the defendants other than Nilmony Singh appealed.

Baboo *Troylock Nath Mitter* for the appellants.

Baboo *Mohini Mohun Roy*, Baboo *Bhowani Churn Dutt*, and Baboo *Golap Chunder Sircar* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—It appears to us that the decision of the Court below on the issue of limitation is erroneous. It appears that

in July 1865 a suit was brought by a person, who was then talookdar, against the defendants for arrears of rent, and in the plaint in that suit it was recited that previously this talookdar had sued the zemindar for a reduction of the talook rent on the ground that the present defendants had alleged their rent to be mokurrari, Rs. 132, whereas the talook rent had been assessed on the allegation of the zemindar that the rent was higher. That is the account given in the judgment of the Court below, and we understand what took place was this. The previous talookdar there spoken of had in the first instance sued these defendants for rent at a rate higher than Rs. 132, and these defendants had then made out their right to hold the mokurrari at Rs. 132, and no more; thereupon the talookdar, being defeated, sued the superior landlord upon the ground that the defendants having set up and proved their right to hold the mokurrari at Rs. 132, his assurances in respect of the assets of the estate had proved unfounded to that extent, and it seems that reduction of their rent was accordingly allowed. Now, in that way it was not merely a setting up of the mokurrari, but it was set up in such a manner as affected the raja zemindar with a loss *pro tanto* of his rent in consequence of this mokurrari. It was manifestly, we think, such an allegation as put upon the raja the necessity of attaching this mokurrari within twelve years. The Court below seems to think that the mokurrari in its fullest sense was not pleaded, because the tenure was described as one granted for maintenance. That seems to me merely to indicate the origin of the grant, and does not amount to any real difference in the nature of it.

Then it is said that, by the custom of this raj, grants for maintenance by the raja of the time being are liable to revocation at the instance and at the discretion of succeeding rajas, and this contention no doubt is supported by a decision of the Judicial Committee of the Privy Council in the case of *Anund Lal Singh Deo* v. *Maharaja Gurrood Narayun Deo Bahadur* (1). But I think it clear that if the right of resumption exists in such cases at the option of each raja at the time of his succession,

(1) 5 Moo. I. A, 82.

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and if he has notice of a claim to hold such mokurrari, and allows twelve years to go by without taking steps to get rid of it, he at least is barred for the time of his enjoyment. That being so, it appears to me that limitation barred the present suit, and that it ought to have been dismissed. The judgment of the Court below is reversed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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Nov 23, 24, 27, 28, & 29

RADHA PROSHAD SINGH (PLAINTIFF) *v.* RAM COOMAR SINGH AND OTHERS (DEFENDANTS).

RADHA PROSHAD SINGH (PLAINTIFF) *v* THE COLLECTOR OF SHAHABAD (DEFENDANT).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Diluviated Lands—Adverse Possession—Doctrine in Lopez's Case.

The doctrine in *Lopez's Case* (1) that diluviated lands, re-forming on their old site, remain the property of their original owner, does not apply to lands in which after their re-formation and indefeasible title has been acquired by long adverse possession, or otherwise.

Where a plaintiff relies on an alleged adverse possession of lands for more than twelve years after their re-formation, the question to be decided is whether he has had such possession for twelve years.

THESE were appeals from a decision of a Division Bench of the Calcutta High Court, dated the 10th June 1874, which reversed a decision of the Judge of Shahabad of the 29th July 1872.

The suits in which these decisions were passed were two out of a number instituted by the father of the appellant to obtain possession with mesne profits of a tract of alluvial land in the Shahabad district, which he claimed as belonging to his estate named Nowrunga, and to which the several defendants laid claim as land which had re formed on the site of land which had been submerged, and which before its submersion had belonged to them.

* *Present* —SIR J. W. COLVILE, SIR B PEACOCK, SIR M E SMITH, and SIR R. P. COLLIER.

(1) *Lopez* v. *Mudden Mohun Thakoor*, 13 Moo. I. A., 467, S C. 5 B L. R., 521.

The decision of the Division Bench from which these appeals were brought will be found printed at pp. 238—245 of the 22nd volume of Sutherland's Weekly Reporter. Earlier judgments of the High Court in connection with the same litigation will be found at pp. 389—393 of the 11th volume of Sutherland, when the claim was held not to be barred by limitation, and was remanded for trial on the merits; and at pp. 109 and 110 of the 16th volume of Sutherland, when, on the 28th June 1871, the case was remanded a second time for trial on the following issues:—

"*First.*—How long has the land now in dispute or its several parts been in existence, and how was it formed?

Second.—When and how did the river recede to the north of the land, the subject of this suit? When and how did the river cease to flow between these lands and the lands in Shahabad, which admittedly belong to the defendants' estate?

Third.—Was the plaintiff in possession of the land claimed, or any, and what portion of it in 1265; and was he then, or at any other, and what time, and how, dispossessed by the defendants?

Fourth.—If the plaintiff had possession till 1265, or till dispossessed by the defendants, what was the nature of that possession, and when and how was it acquired? And had it existed for more than twelve years?"

The Judge of Shahabad, trying the cases on these issues, in the suit in which Ram Coomar Singh and others were defendants, gave a decree in favour of the plaintiff for a portion only of the land claimed. In the other suit, in which the Collector of Shahabad was made a defendant, the whole of the land claimed by the plaintiff was decreed to him. By the judgment of the High Court now appealed from, the decisions of the Judge of Shahabad were reversed and the plaintiff's claim dismissed.

In the appeal in Radha Proshad Singh *v.* Ram Coomar Singh and others (No. 50 of 1874), Mr. *Leith*, Q.C., and Mr. *Doyne* appeared for the appellant, and Mr. *Graham* for the respondents.

In the appeal in Radha Proshad Singh *v.* The Collector of Shahabad (*No.* 57 of 1874), Mr. *Leith*, Q.C., and Mr. *Doyne* appeared for the appellant, and Mr. *Cowie* Q.C., and Mr. *Graham* for the respondent.

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The material facts of the case are fully stated in their Lordships' judgment, and which was delivered by

SIR J. W. COLVILE.—The appeals of which their Lordships have now to dispose are those which the appellant has preferred in two out of seven suits instituted by him in order to recover a large quantity of alluvial land lying now to the south of the Ganges, and accordingly transferred by order of the Government from the Zillah of Ghazeepore to that of Shahabad. Notwithstanding the great volume of the record, and the number of the proceedings contained in it, the facts essential to the determination of these appeals may be brought within a narrow compass. It appears that, at the time of the perpetual settlement, the river Ganges was not only the boundary, as it is still, between the two Zillas of Ghazeepore and Shahabad, but also the boundary between the Mouza Nowrunga, belonging to the plaintiff's ancestor on the left or northern, and a number of mouzas on the right or southern, bank of the then channel of the river, which were settled with other proprietors. Immediately on the southern or Shahabad side of the river, and included in these mouzas, was an area of low soft land, some six miles wide, favourable to the erratic habits of the Ganges, but bounded on the south by higher or harder land, which opposed itself to the further progress or invasion of the stream in that direction. The precise changes in the course of the river have been proved with greater clearness than is usual in cases of this kind, and are delineated in what has been called the ameen's map No. 7. 2. From this and from the evidence it appears that in the year 1839 the river occupied a position considerably to the south of that which it occupied at the date of the settlement, and now occupies; that in 1844 it had travelled to an ascertained channel still further to the south, and in 1857 had for some years reached its southernmost limit, *viz.*, the high or hard bank which has been referred to. It is, moreover, clearly shown that, towards the end of the rains of 1857, the river, when subsiding into its cold-weather channel, made a sudden change of that channel, intersecting the land to the north of its former course, and occupying the position designated upon the ameen's

map as "Bhagur 2." Its course, however, in that channel was not permanent; for, either by sudden change or by gradual recession, it travelled still further to the north until it returned to the bed from which it is supposed to have started at some time after the date of the perpetual settlement, being that which it occupied when the decrees under appeal were made.

Upon the sudden change of 1857-58, different persons, claiming to be the owners of some of the villages which had before been diluviated, seem to have taken possession of the land re-formed upon the sites of their old villages, so far as it was then south of the new channel of the Ganges. And when the river went further back, their Lordships presume that other persons similiarly claimed and took possession of the additional land that had then become south of the Ganges. The result was that, after some discussion between the authorities of the two zillas, a thakbust was made by the revenue officers of Shahabad in 1864, which apportioned the whole of this disputed land, as re-formation on the sites of the ancient villages, among the representatives of the persons with whom those villages had originally been settled; and confirmed their possession of the plots allotted to them. Between 1858 and this thakbust of 1864 there had been various proceedings before the revenue officers of Zilla Ghazeepore, at the instance of the plaintiff as owner of Nowrunga, under Act I of 1847; but to these it is now unnecessary to advert. After the thakbust of 1864, the plaintiff brought one suit against all the claimants of the disputed land. That was dismissed as improperly framed. He then instituted the different suits, with two of which their Lordships have now to deal. These it will be convenient to call suit No. 2 and suit No. 6, distinguishing them by the numbers whereby the lots claimed in them respectively are described on map No. 7. 2, rather than by the numbers which the suits themselves bore in the Indian Court (1).

(1) Suit No. 2 was that in which Ram Coomar Singh and others were the respondents, and corresponds with Appeal No. 50 of 1874. Suit No. 6 was that in which the Collector of Shahabad was respondent, and corresponds with Appeal No. 57 of 1874. In suit No. 2 the plaintiff sought possession of the lands Pursownda and Sohia. In suit No. 6 he sought possession of the Mouza Sreepore.

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It lies of course upon the plaintiff to prove in each a superior title in order to dispossess the defendants.

Neither party originally put his case precisely in the form in which, after the decision in *Lopez's Case* (1), and the second remand of the suits by the High Court, it assumed.

Their Lordships propose to treat that second remand as a new departure, and the commencement of the litigation upon which they have to form a judgment. And they may at once state that they cannot concur in the final judgment of the High Court in so far as that casts any doubt upon the propriety of directing the third and fourth of the issues for the trial of which the suits were remanded. The doctrine in *Lopez's Case* (1) was doubtless in favour of the defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzahs, which would *primâ facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's Case* (1) cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title. In the present suits the plaintiff relies on an alleged adverse possession for more than twelve years of the lands after their re-formation; and therefore the real point to be decided in the suits was whether a title had been thus acquired by the plaintiff, the proprietor of mouzah Nowrunga.

Now, for the purpose of considering this, which seems to be he only material issue, it will be convenient to travel, as the river originally did, from the north to the south. Their Lordships consider that the point to be determined is whether in 1857 such a new title existed as to all or any of the lands in dispute, because they think it is clearly proved that the change of the river in 1857-58 was a sudden change, which left the rights of the parties as they then existed unaffected thereby. The nature of the change in 1861 is perhaps not so clearly

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proved. The Zilla Judge certainly found that to have been also a sudden change; for he says that the river began to leave the channel in which it had gone from 1858, in 1267 F. or 1860, and in 1268 F. was found in the place in which it now is—a state of things which implies suddenness of change. Moreover, the evidence on the whole preponderates in favour of this last change having been also a sudden change. Their Lordships, however, do not think it very material to find one way or the other upon that point, because even if the river had receded from the channel, marked as Bhagur 2, gradually to the place which it now occupies,—if it had passed, for instance, over Mouza Sreepore, submerging that mouza again; the submergence and re-appearance of the land both taking place within the three years,—if that were so, and the question was, who was entitled to the re-formation of the mouzah upon that site of Sreepore, upon this second re-appearance, their Lordships, conceive that, according to the strict doctrine in *Lopez's Case* (1), if the plaintiff had previously to 1857, acquired the proprietorship of that land, it would be he and not the original owner of Sreepore who would be entitled to claim the benefit of that doctrine.

Then going back to the application of the principle which has been already laid down to the lands in dispute in this case, their Lordships have to consider first whether the plaintiff had or had not in 1857 acquired such a title as has been described to the land north of the river as it ran in the year 1839; and they think that upon the evidence there can be no doubt he had such a title. They rely mainly upon the thakbust proceedings of that year. It appears to them clear upon those proceedings and the maps embodied in them that the land down to the north part of the river as it existed in 1839 was then measured as belonging to Nowrunga, and in possession of the plaintiff's ancestor; that the greater part of that land was laid out field by field as land which had been gained by accretion at that time; and that although there was a small portion which is described in the thakbust maps as "registran or sand," that too was measured into Mouza Nowrunga and the Zilla of Ghazeo-

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pore. No objection or claim seems then to have been preferred on the part of any proprietor on the Shahabad side of the river. And it is clear that the plaintiff and his ancestors were afterwards, and up to 1857 or 1858 in possession of this land; that is, for a period of about eighteen years.

The whole of the land in dispute in suit No 6 falls within the boundaries of Nowrunga as thus defined in 1839. In that suit it has been attempted at the bar to raise some contention on the supposed effect of the confiscation of Koer Singh's estate, of which Mouza Sreepore once formed part. But that is a point that never seems to have been raised in the Court below; and so far as their Lordships can see, there can be no ground for the contention. It seems to them that the whole of this lot must have been diluviated, and that, when left dry as the river receded still further, it was assumed to have become by accretion part of Nowrunga. It was measured as such in 1839; and if the second change of the river in 1861 was a sudden change, that land has ever since 1839 been dry land, and was up to 1861 in the possession of the plaintiff. Again, if the changes in the course of the river between 1858 and 1861 were not sudden, but gradual, the subsequent diluviation and re-appearance of the land could not, as has already been stated, defeat the title to the site which the plaintiff had gained before 1858. These considerations suffice to dispose of the appeal in suit No. 6.

With respect to the appeal first heard, that in the suit No. 2, the case is different. In order to substantiate the whole of the plaintiff's claim, it would be necessary to show that in 1858 he had been in possession of this land almost up to the extreme southern boundary for more than twelve years. Now their Lordships have felt no hesitation in concurring with both the Courts in so far as they have found that no such title was established to land beyond the course of the river in 1844. There is no clear evidence how, or in what particular year, that land accreted; and it is impossible to say that there has been a possession for twelve years, or any possession that would be sufficient to defeat what is *primâ facie* the superior title of the defendants. Their Lordships have had more doubt as to the land lying between what was the northern bank of the river in

1839 and that which was its northern bank in 1844; but even if they had been disposed to agree with the Zilla Judge in respect of this land, they could not have concurred in his judgment in so far as it gives to the plaintiff the bed of the river as it existed in 1844, and carries his boundary up to what was then the southern bank of the river Although in the case of a wandering and navigable stream like this, the bed of the river may be said temporarily to belong to the public domain, that state of things exists only while the water continues to run over the ground; and it clearly appears on the face of the thakbust map of Mouza Sohia, which was made in the course of the survey of 1844 (and these proceedings are the strongest evidence, such as it is, which the plaintiff has given of his possession of the land now in question,) that some land which had once formed part of that mouza was then on the northern bank of the river, and consequently that the ground over which the river then ran had also been part of Sohia; and if this be so, when the bed of the river became dry, the right of the defendants to the new formation on that site would attach, and there is no proof of a length of possession of that re-formation which would defeat their title

The point upon which their Lordships have felt greater difficulty is whether there was not sufficient proof of possession for twelve years on the part of the plaintiff of the land up to the northern bank of the river as it ran in 1844. It has been argued that the thakbust proceedings of 1844-45 were as strong to prove the possession of the plaintiff or his ancestor of the land north of the river as it then ran, as were those of 1839 to prove his possession of the land within the boundary then laid down, up to the line of the river in 1839 Their Lordships, however, do not think that this is so. The later thakbust proceedings related to Mouza Sohia, and were made in Shahabad, and the river was then the boundary not only of the Zilla of Shahabad, but also of two provinces under distinct Governments, *viz*, the North-West Provinces and the Lower Provinces of Bengal. The authorities of Shahabad presumably had no authority to carry their thakbust beyond the southern bank of the river as it then ran. Again, upon the face of the thakbust map is the statement already referred to, wherein, after mentioning

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that the entire area of Sohia had been 2,451 bigas, but that out of that only 400 bigas existed which were under cultivation, (that being, as their Lordships understand, the portion of Sohia that was then on the south side of the river,) it is stated: "The remaining land"—that is, 2,051 bigas—"was washed "away by the Ganges, and has now accreted on the north side of "the river Ganges in a small quantity, and consists of sand." Therefore that which was out of the bed of the river on the northern bank, seems to have then been, according to this statement, waste uncultivated land, over which no acts of ownership had been exercised, and in which the possession or the right of the plaintiff had been positively affirmed by no measurement on the other side of the river. The doubt their Lordships have had is whether there was not other evidence from which it might be properly inferred that cultivation had afterwards been extended and acts of ownership exercised over this land by the plaintiff between 1845 and 1857, without question, so as to establish an adverse possession of it as against the defendants for twelve years. But, upon the whole, looking to the uncertainty of the genaral evidence as to this strip of land; to the not very clear finding of the Zilla Judge regarding it; and to the fact that much better evidence as to payment of the rent and the like might have been given than was given, they have come to the conclusion that they have not sufficient grounds before them for disturbing the finding of the High Court upon this part of the case. The plaintiff, therefore, must be taken to have failed to have made out a sufficient title to any land which was not north of the river as it ran in 1839.

The result is, that in suit No. 6, in which all the land claimed lies above the line of 1839, their Lordships must humbly advise Her Majesty to reverse the decision of the High Court in that suit, and to affirm the decision of the Zilla Judge, with the costs of the appeal in the High Court. When they delivered judgment they proposed to advise Her Majesty to dismiss the appeal, and to affirm the decision of the High Court in suit No. 2, inasmuch as they then understood that all the land claimed in that suit lay below the line of 1839. It having, however, been brought to their notice, before the report was

drawn up. that, notwithstanding the statement of the Zilla Judge to the effect that no part of the land north of that line was in question in the suit, the maps which are in evidence in the cause, and particularly the ameen's map No. 7. 2, afford ground for believing that a small portion of the land claimed, being part of that in the possession of the defendants as their Mouza Pursownda, is, in fact, above the line of 1839, the order which their Lordships will recommend Her Majesty to make in this suit is, "that the decree of the High Court be "varied, by declaring that the plaintiff is entitled to recover, "and ordering that he do recover, so much (if any) of the land "claimed by him in this suit as lies to the north of the line "delineated in the ameen's map No. 7. 2, as the northern bank "of the river Ganges in the year 1839; the amount (if any) of "such land to be ascertained, in case of dispute, by proceedings "in execution; but that in all other respects the decree of the "High Court be affirmed." This order seems to their Lordships calculated to assure to the plaintiff, with the least risk of future litigation, that to which he may be entitled upon the principle laid down by them in their judgment. But considering the manner in which the question concerning this, at most inconsiderable, portion of the land in dispute has been brought before them, they do not think it would be right to make any order touching the mesne profits of what may be recovered, or to vary the decree of the High Court as to the costs of the litigation. They think also that the plaintiff ought to pay the costs of the appeal to Her Majesty in this suit. The respondents in suit No. 6 must pay the costs of the appeal in that suit.

In Appeal No. 50 of 1874.

Agents for the appellant: Messrs. *Burton, Yeates,* and *Hart.*

Agents for the respondents: Messrs. *Henderson and Co.*

In Appeal No. 57 of 1874.

Agents for the appellant: Messrs. *Burton, Yeates,* and *Hart.*

Agents for the respondent: Messrs. *Lawford* and *Waterhouse.*

P. C*
1878
March 14,
and
April 13.

DORAB ALLY KHAN (PLAINTIFF) *v.* THE EXECUTORS of KHAJAH MOHEEOODEEN (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Sale by Sheriff under Writ of Fieri Facias—Warranty.

A writ of *fieri facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his own territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

But if the Sheriff acts *ultra vires, e.g.*, if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in India the difference between real and personal estate which obtains in England, and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate.

A Sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor, who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions.

In this case the Sheriff of Calcutta, to whom a writ of *fieri facias* had been issued by the High Court directing him to execute a decree of the late Supreme Court, seized and sold landed property in a province not within the territorial jurisdiction of the said Courts, and handed over the proceeds of the sale to the judgment-creditor. The purchaser at the Sheriff's sale, being afterwards evicted by the execution-debtor, brought an action for money had and received against the judgment-creditor, under whose authority and by whose express direction he alleged that the Sheriff had acted. The question of law raised in the case was as to whether the plaint filed disclosed a good cause of action. The facts of the case and the judgments

* *Present*.—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

of the Courts below dismissing the action will be found set forth at pages 55 to 73 of the first volume of these reports.

Mr *Leith*, Q.C, and Mr. *C. W. Arathoon* for the appellants. —The Courts below were wrong in holding that the plaint disclosed no cause of action. The sale by the Sheriff of land pointed out by the execution-creditor was a sale by the execution-creditor himself. The Sheriff acted as his agent and under his special instructions. Oudh not being included in the places enumerated in the writ of *fieri facias*, and not being subject to the jurisdiction of the High Court at Fort William, the sale by the Sheriff of property in Oudh was *ultra vires*. That sale had been judicially pronounced to be void, and the plaintiff had been ousted. Under these circumstances he is entitled to have the price paid for the property at the Sheriff's sale returned to him by the execution-creditor, to whom the Sheriff had paid it over. The purchase was made under a mistake. The Sheriff had no power to sell, but all parties were under the belief that he had. There had been a failure of consideration. A Court of Equity will interfere to rescind a contract when the vendor has no interest in the subject-matter at the time of sale, on the ground of mistake—*Hitchcock* v. *Giddings* (1). [Sir B. PEACOCK—There the price had not been paid. Does not the rule *caveat emptor* apply here? Had the purchaser looked at the writ, he would have seen that it did not authorize the Sheriff to sell land in Oudh. Had that objection been taken at the time, a copy of the writ might have been sent to the Commissioner of Oudh, and the sale regularly made] The nature of the proceedings gave no opportunity to puchasers to investigate title. If the money had remained with the Sheriff, we might have sued him. [Sir B. PEACOCK.—The Sheriff, in selling gives no warranty of title. Sir R. COLLIER referred to Sugden's Vendors and Purchasers, 14th edn., p. 459, as to eviction by a title to which the coveants do not extend. Sir M. SMITH.—The argument as to warranty goes on the rules of the English law as to the sale of real property, which would not apply in India.] There is a

(1) 4 Price, 135

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distinction between the present case, where the sale proceeds *in invitum* under the direction of the officer of the Court, and the case of a sale between two private parties. Here the plaintiff could not protect himself by enquiries into title, nor insist on covenants. The defendant might also be held liable in tort having wrongfully put the Court in motion. [Sir R. COLLIER.—All that he did was to point out lands in Oudh which were not covered by the writ.]

Mr. *Cowie*, Q.C. (with him Mr *Doyne* and Mr. *Graham*), for the respondents, supported the judgments of the lower Courts. Assuming the Sheriff to be merely the agent of the judgment-creditor, and the latter to be in point of fact the vendor, the plaintiff had no cause of action against him either in tort or on contract. There was no warranty of title. The principle *caveat emptor* applied. By the bill of sale independent of the writ, the plaintiff had notice that the property was not within the jurisdiction of the High Court. With that notice he voluntarily paid the purchase-money. Moreover, he had enjoyed substantial possession, having held the property for more than two years; so that in any case an account would have to be taken. As to the contention that the transaction had been brought about by mistake, if there was mistake, it was of law and not of fact. There was no averment in the plaint of mistake either of law or fact. In *Hitchcock* v. *Giddings* (1), cited for the appellant, the price had not been paid, and the facts in other respects bore no resemblance to those shown in this case.

Mr. *Leith* replied.

Their Lordships took time to consider their judgment, which was delivered by

Sir J. W. COLVILE.—This is an appeal against a decree of the High Court of Calcutta, sitting as a Court of Appeal, which, on the 23rd August 1875, affirmed the judgment of

(1) 4 Price, 135.

Mr. Justice Phear, who, in the exercise of the original civil jurisdiction of the same Court, had, on the 22nd April 1875, dismissed the appellant's suit with costs.

The suit was instituted in December 1872 by the appellant, suing as executor of one Dianut-ut-Dowlah, against Khajah Moheeooddeen, who died after leave to appeal had been given in India, and is represented by the present respondents. The case was tried in India upon only the first and preliminary issue, *viz.*, whether or not a good cause of action was disclosed in the plaint. It is, however, conceded that the statements in the plaint may be taken to be supplemented by, and to include, any fact stated, or to be inferred by necessary implication from the written statement of the plaintiff, or the documents annexed to and filed with either that or the plaint itself. These are the Sheriff's bill of sale of the 9th October 1866; a petition of Dianut-ut-Dowlah to the Judicial Commissioner of Oudh, and the order thereon; the will of Dianut-ut-Dowlah and the certificate granted to the plaintiff as the executor named therein; the writ of *fi. fa.*, dated the 18th June 1866; and the warrant of attorney to confess judgment in the action in which that writ was issued. For the trial of the issue, which is in the nature of a trial on demurrer, the facts stated or to be implied as above mentioned must be taken to be true.

What, then, are those facts? Taken in chronological order, they are as follows:—In 1856, under the before-mentioned warrant of attorney, judgment was entered up in the late Supreme Court of Judicature at Fort William, at the suit of Khajah Moheeooddeen (the defendant in this action), and one Robert O'Dowda, who was only joined with him as co-plaintiff in order to give the Court jurisdiction against Wazeer Khan and Khajah Abdoos Samut, for the purpose of securing the repayment of Company's Rs 70,000, with interest, on the 23rd July 1856. In order to enforce this judgment against Khajah Abdoos Samut, and the representatives of Wazeer Khan, who was then dead, a writ of *fi fa.* was, on the 18th June 1866, directed to the Sheriff of Calcutta, commanding him to cause "to be levied and made of the houses, lands, debts, and other effects, moveable and immoveable, of the said defendants, within the provinces, districts, or countries of Bengal, Behar, and Orissa, or

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in the province or district of Benares, or in any other factories, districts, and places which then were annexed to and made subject to the Presidency of Fort William in Bengal, by seizure, and if necessary by sale thereof," a certain sum therein mentioned. The plaintiff alleged that this writ did not legally authorize the levy of the sum in the writ mentioned by the seizure and sale of immoveable properties in Oudh; but that, nevertheless, the Sheriff, "by the authority of Khajah Moheeooddeen, the execution-creditor, and on the express instructions of his attorney, and professing to act under and by virtue of the said writ," on the 2nd and 20th days of August 1866, seized the right, title, and interest of Abdoos Samut and of Wazeer Khan, then in the hands of his heirs and representatives in a talook and premises within the Province of Oudh, and put the property so seized up for sale on the 4th October in the same year; that Dianut-ut-Dowlah became the purchaser of it for the sum of 26,000 rupees; and that the Sheriff afterwards executed to him the bill of sale of the 9th October 1866, which is annexed to the plaint. He further alleged that, before the execution of the bill of sale, Dianut-ut-Dowlah paid the purchase-money to the Sheriff, who, about the 12th October 1866, paid 5,000 rupees, part thereof to the attorney of the plaintiffs in the suit; and on the 25th October 1867 paid the balance of the purchase-money, less his poundage and charges, to Moheeooddeen himself; that the Sheriff, by his officer, put Dianut-ut-Dowlah into possession of the property, but that such delivery of possession was not legal or operative by the law then in force in Oudh, and that by that law the sale was wholly inoperative, and did not pass the right, title, and interest of the judgment-debtors or of any other person to Dianut-ut-Dowlah; that afterwards and under some proceedings which took place in the Courts in Oudh (the nature whereof, except that they began with a proceeding instituted by Dianut-ut-Dowlah himself for a partition, does not very clearly appear), the sale was pronounced null and void, and that thereupon, and in the month of August 1868, Dinut-ut-Dowlah was removed from possession of the talook and premises The plaintiff then admitted that Dianut-ut-Dowlah, whilst in possession, had made collections to the amount of

10,937 rupees, but alleged that after payment of the Government revenue, collection, and law charges, and other necessary outgoings, a balance of only Rs. 446-6-9 remained in his hands, and that such balance was the only profit, benefit, or advantage which he obtained from the purchase; and then, after stating the death of Dianut-ut-Dowlah on the 23rd June 1868, the title of the plaintiff as his executor, a demand by the plaintiff and a refusal by the defendant, the plaint goes on to say—"The plaintiff sues the defendant for the sum of 26,000 rupees for moneys had and received by the defendant for the use of the said Dianut-ut-Dowlah."

Mr. Justice Phear, in the course of his judgment, made some attempt to support the regularity of the seizure and sale of the property under the writ of *fi. fa.* In their Lordships' opinion, the decree under appeal cannot be supported upon any such ground. The illegality of these proceedings is sufficiently alleged, and the objection to them is patent on the face of the plaint. The jurisdiction of the late Supreme Court, and of the Sheriff as its officer, was originally limited by the Charter of Justice of 1774, to the Provinces of Bengal, Behar, and Orissa, and though afterwards extended by the 39 and 40 Geo. III, c. 79, s. 20, was so extended only to the province or district of Benares, and to and over all such provinces and districts as might at any time thereafter be annexed to and made subject to the Presidency of Fort William. The writ of *fi. fa.*, which was the Sheriff's authority for the seizure, was carefully framed in accordance with this definition of his jurisdiction. If, therefore, he seized property in any place which did not form part of, and had not been annexed to, the Presidency of Fort William, he was as much a trespasser as an English Sheriff who had seized property out of his bailiwick would be. That the Province of Oudh was not, when first annexed to British India, or at the date of the execution, annexed to the Presidency of Fort William, if not one of those historical facts of which the Courts in India are bound, under "The Indian Evidence Act, 1872," to take judicial notice, was at least an issue to be tried in the cause.

The question to be determined was, however, correctly stated in the judgment of the High Court on the appeal.

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After stating that they must assume it as established that the Sheriff had no right to execute the writ upon property in Oudh, and also, though that was not so clearly stated in the plaint as it might be, that the result of the proceedings before the Commissioner of Oudh was that the sale was declared null and void, and that the plaintiff's testator was thereupon evicted from the property, the learned Judges said: "The question then arises, can the purchaser, at a sale by the Sheriff under a writ of *fi fa.*, upon being evicted by the execution-debtor, recover the purchase-money which he has paid from the execution-creditor, if it should turn out that the Sheriff had no authority to execute the writ at the place where the property was situate?" If that sentence had stood alone, their Lordships think it would have required to be modified by the addition of some such words as "and that he did so execute it under authority, and by the express direction of the judgment-creditor." They understand, however, that modification to be implied in the next sentence of the judgment, which is in these words:—"We are asked by the appellant to consider and decide the case upon the assumption that the Sheriff in seizing, selling, and conveying the property was the agent of the execution—creditor; that the execution—creditor was in fact the vendor, and as he had no right whatever to deal with or sell the property, there was a total failure of consideration, and that consequently the money paid to him for the purchase became money had and received to the use of the plaintiff's testator." This assumption seems to be amply justified by the eighth paragraph of the plaintiff's written statement and the letter therein set forth (1). The question thus stated is novel, and not without difficulty.

(1) Paragraph 8 of the plaintiff's written statement is as follows:—

"That before the execution of the said writ of *fieri facias*, Mr. Nicholas "Paliologus, the Attorney of the said Khajah Moheeooddeen, wrote and sent "to the then Sheriff of Calcutta the letter following:—

"Sir,—Please to seize such properties of the defendant which will be "pointed out to you by the plaintiff, and which are in the actual possession "of the defendants or some of them.

Yours obdiently,
N. PALIOLOGUS,
Plaintiff's Attorney."

Their Lordships propose to consider, first, whether, in the circumstance stated, the evicted purchaser can have any remedy against the execution-creditor.

There is no doubt that the authorities cited in the judgment of the High Court, and relied upon at the bar, establish the proposition which is thus stated by Lord St. Leonards at page 549 of the 14th edition of his work on Vendors and Purchasers: "If the conveyance has been actually executed by *all* the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity." This general rule seems by the law of England to govern all sales by private contract between the parties, either of a freehold or of a leasehold interest in land.

Does it, however, govern a case like the present, in which the sale, as regards the owner of the thing sold, is *in invitum*, and made under colour of legal process? The chief reasons for the rule are that the purchaser by private contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good, or of protecting himself against any apparent or latent defect in it by proper and apt covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best very inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title, and interest of the judgment-debtor with all its defects; and the Sheriff who sells, and executes the bill of sale, is never called upon, and, if called upon, would refuse, to execute any covenant of title. Therefore, the reasons for the rule failing, the rule itself cannot properly be held applicable to sales by the Sheriff, which are governed by rules peculiar to such sales.

Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-creditor. This, however, is because the Sheriff is authorized by the writ to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

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The Sheriff, however, if he acts *ultra vires*, cannot invoke the protection which the law gives to him when acting within his jurisdiction. He is in the position of an ordinary person who has sold that which he had no title to sell. And it appears to their Lordships that his responsibility in respect of the sale must be governed by the law relating to the sale of chattels, rather than by that relating to the sale of real estate. There is not in India the difference between real and personal estate which obtains in England; and moveable and immoveable property are alike capable of being seized and sold under a writ of *fi. fa.*

The law of England as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on Sales, 2nd edition, page 511 *et seq.* In *Sims* v. *Marryat* (1), Lord Campbell, when commenting on Mr. Baron Parke's judgment in *Morley* v. *Attenborough* (2), after saying that the law was not in a satisfactory state, observed: "It may be that the learned Baron is correct in saying that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule."

One of the latest expositions of the law on this point is to be found in the case of *Eichholz* v. *Bannister* (3), which was decided in 1864. In that case Ch. J. Erle is reported to have said: "I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." This passage, it is to be observed, although contained in the report in the "Law Journal," is not to be found, *totidem verbis*, in the regular report. The actual decision, however, in which all the Judges concurred, was that on the sale of goods in an open shop or

(1) 17 Q. B., 281.
(2) 3 Exch., 500.
(3) 34 L. J., C. P., 105, S. C., 17 C. B., N. S., 708.

warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise, the buyer may recover back the price as money paid as on a consideration that has failed.

A rule of this kind cannot, of course, be applied to a sale of goods by the Sheriff under a *fi. fa.*, because what the Sheriff professes to sell is only the right, title, and interest, whatever that may be, of the judgment-debtor, and this was the express ground of the decision in *Chapman* v. *Spiller* (1), where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morely* v. *Attenborough* (2), which, of the modern cases, is the most favourable to the application of the maxim *caveat emptor*, the Sherif may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on the sale by a pawnbroker of an article pawned with him as an unredeemed pledge, there is no implied warranty of the pawner's title, the judgement of Mr. Baron Parke seems to assume that the pawnbroker does warrant that the article has been pledged with him, and has become irredeemable. The learned Judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So too it may be inferred from *Hall* v. *Conder* (3), that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasable, it would be reasonable to hold that there is an implied warranty that Letters Patent for the alleged invention have been regularly issued under the Great Seal. Their Lordships think that, upon a similiar principle, the Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be

(1) 14 Q B., 621. (2) 3 Exch., 500.
(3) 2 C. B., N. S., 22.

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turned out of possession by some person other than the judgment-debtor.

In the present case the subject-matter of the sale was the estate of the execution-debtor, so that if the Sheriff had had jurisdiction his conveyance would have passed the title. It was solely because he was acting beyond his territorial jurisdiction that the sale became inoperative, and wholly ineffectual. The High Courts have assumed that if the defendant is to be treated as a principal in the transaction (and their Lordships think he ought to be so treated), the case must be governed by the ordinary rules relating to vendors and purchasers upon voluntary sales of immoveable property. This view does not appear to their Lordships to be correct. The defendant directed the Sheriff to sell in his character of Sheriff. He did not profess to sell, nor could he have sold, as for himself. He intended the sale should be, as in fact it was, a sale by the Sheriff as Sheriff, and with the incidents attaching to such a sale. For the above reasons their Lordships are of opinion that the action cannot be properly determined without further investigation into the facts, as they cannot say that the plaint and the other documents on the record do not disclose a *primâ facie* case for some relief against the defendant.

There is, no doubt, a further question whether the plaintiff has shown a case which, if proved, would entitle him to recover back the purchase-money as money had and received to his use as upon a total failure of consideration. To that their Lordships think the admitted fact of the possession by his testator for nearly two years of the property in question, and his reception, partial at least, of the rents and profits, might be a fatal objection. It could not, in such case, be said that the consideration wholly failed. But it is not quite clear on the record that this objection arises, since if the sale has been treated as a nullity, the purchaser has been accountable, and may have accounted, for what he received; and in any case the Court in India will be competent to mould the relief according to the facts finally established at the hearing. Their Lordships, of course, offer no opinion whether the plaintiff will ultimately succeed in establishing his right to

any relief. It may turn out that his testator, who never made any claim for a return of the purchase-money in his lifetime, bought with knowledge of the defect in the Sheriff's jurisdiction, or has, by acquiescence or in some other way forfeited any right which he might otherwise have had to relief. They only decide that the plaintiff has not wholly failed to disclose a good cause of action on the face of the record; and that the cause ought to be tried upon the other issues that have been, or may be, raised in it. And they will, accordingly, advise Her Majesty to reverse the two decrees of the High Court, and to remand the cause for trial upon any other issues settled or to be settled in the suit. They think that the costs of both parties to this appeal should be taxed, and a certificate of their amount sent to the High Court, in order that they may hereafter be dealt with by that Court as costs in the cause.

Case remanded.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

HURRO PROSHAD ROY (PLAINTIFF) *v.* GOPAUL DASS DUTT AND OTHERS (DEFENDANTS).*

1878 *May* 16.

Suit for Possession dismissed—Subsequent Suit for Arrears of Rent—Limitation—Beng. Act VIII of 1869, *s.* 29.

The ancestors of the plaintiff purchased certain property from Government in 1861, subject to an unexpired lease held by the defendants of the same property. On the expiry of the lease in 1866 the plaintiff endeavoured to obtain possession, but was opposed. He omitted to sue for possession till 1874, when the defendants set up certain chukdari tenures, and the Court found the defendants were entitled to the rights claimed; also finding that the plaintiff's suit was barred by limitation Plaintiff thereupon, in 1876, brought a suit against the defendants for arrears of rent for the year 1866—72. *Held*, that as the last rent thus claimed accrued due in 1872, plaintiff's right was barred by s. 29, Beng. Act VIII of 1869.

* Regular appeal, No. 45 of 1877, against the decree of Baboo Brojendro Coomar Seal Roy Bahadoor, Second Subordinate Judge of Zilla 24-Pargannas, dated the 20th November 1876.

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Ranee Surnomoyee v. *Sooshee Mookhee Burmonia* (1) distinguished.

A plaintiff, who, through, want of inquiry or mistake, brings a suit which he is unable to establish, will not be allowed, on discovering his error and bringing a suit in which he would have been entitled to recover, had he brought it within time, to take advantage of his own mistake to relieve himself from the law of limitation

THIS was a suit brought to recover arrears of rent alleged to be due on certain chukdari tenures from the year 1272 to the year 1279 (1866—72).

The tenures in question originally belonged to the ancestors of the defendants, but on their making default in payment of the Government revenue, the talook was, in the year 1838, put up to sale under the provisions of Reg. XI of 1822, and purchased by the Collector on behalf of Government. From the years 1838 to 1840 the land was under the direct management of Government, and from the year 1841 to the year 1866 the defendants leased the property from Government. In the year 1861 Government sold its rights in the talook to the father of the plaintiff, and in the year 1866, on the expiration of the lease of the defendants, the plaintiff endeavoured to obtain possession of the land, but was opposed by the defendants. The plaintiff, in 1874, then brought a suit for possession of the property, and the defendants set up certain chukdari tenures. The Court in deciding the case held that the defendants had failed to prove the tenure set up by them, but dismissed the plaintiff's suit on the ground that the suit was barred by limitation, inasmuch as defendants' lease ran out in the year 1865, and from that time to 1872 plaintiff had neither sought for rent nor possession On appeal the High Court found against the plaintiff both points decided by the lower Court and dismissed the appeal.

The plaintiff then brought this present suit against the defendants to recover arrears of rent for the year 1272 to the year 1279 (1866—72). The Court of first instance, on the ground that the claim was barred by limitation under s. 29 of Beng Act VIII of 1869, dismissed the suit, and the plaintiff thereupon appealed to the High Court.

(1) 11 W. R, P. C., 5.

Mr. *Anund Mohun Bose*, Baboo *Bhowani Churn Dutt*, and Baboo *Nil Madhub Bose* for the appellant.—The suit is not barred by s. 29, Act VIII of 1869, if the principle laid down in the case of *Ranee Surnomoyee* v. *Sooshee Mookhee Burmonia* (1), as extended by this Court, be applied to our case. Following that case, our cause of action did not accrue until the judgment in the possessory suit in 1876 was delivered, also see *Eshan Chunder Roy* v. *Khajah Assanoollah* (2), *Dindayal Paramanik* v. *Radhakishori Debi* (3), *Mohesh Chunder Chakladar* v. *Gungamonee Dossee* (4).

Mr. *Brownfeld* and Baboo *Radhika Churn Mitter* for the respondents.

The judgment of the Court was delivered by

GARTH, C.J.—The only question in this appeal is that of limitation; and, in order to the proper solution of that question, having regard to the authorities to which our attention has been called, it is necessary to state the facts with some precision.

The suit is brought to recover arrears of rents of certain chukdari tenures from the years 1272 to 1279.

These tenures are within the limits of Talook Kassinugger, which originally belonged to the defendants' ancestors; but as they failed to pay the Government revenue, the talook was sold in the year 1838 under Reg XI of 1822, and purchased by the Government.

In 1841 the defendants took a farming lease of it for five years in the name of one Bissonath Dey.

In 1846 that lease was renewed for another twenty years, so that the defendants held the talook in ijara up to 1866.

Meanwhile, in 1860, the Government sold its proprietary right in the talook to the plaintiff's father, who afterwards died, leaving the plaintiff his heir; and on the expiration of the ijara lease in 1866, the plaintiff endeavoured to take khas possession of the entire talook from the defendants.

(1) 11 W. R., P C, 5
(2) 16 W. R., 79.
(3) 8 B L R, 536
(4) 18 W R., 59.

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The defendants, however, set up certain chukdari tenures extending over a large portion of the lands of the talook; whereupon the plaintiff in the year 1874 brought a suit to recover khas possession of those lands. The defendants pleaded their chukdari rights; and the District Judge, though he decided the question as to those rights against the defendants, decreed the suit in their favour on the plea of limitation.

On appeal, however, the High Court found against the plaintiff upon both points, considering that the evidence established the fact of the existence of the chukdari tenures, it having been proved satisfactorily that before the purchase of the Government rights by the plaintiff's father, the defendants had paid rent for those tenures to the Government, for which they produced receipts signed by the Collector.

The effect of this finding was of course that the plaintiff was not entitled to dispossess the defendants of the lands in question, and that the defendants were held to be tenants to the plaintiff of those lands.

The plaintiff then asked leave of this Court to appeal to the Privy Council, which was refused; but afterwards upon a direct application to the Privy Council he obtained leave, and the case is now pending in that Court.

Meanwhile, upon the basis of the judgment of the High Court, the plaintiff brought this present suit against the defendants to recover the back rents of the chukdari tenures from the years 1866 to 1872.

It is admitted that the last rent thus claimed accrued due in 1872, more than three years before this suit was brought in 1876; but then it is said that the principle of the case of *Ranee Surnomoyee* v. *Sooshee Mookhee Burmona* (1) applies here, and that the cause of suit for these rents did not accrue to the plaintiff until the High Court delivered their judgment in the former suit in the year 1876, confirming the existence of the chukdari tenures.

Our attention has been called by Mr. Bose to several cases in this Court to which the ruling of the Privy Council has been

(1) 11 W. R., P. C., 5.

applied; and it has been argued that, although the facts of this case may not quite resemble those of the case of Ranee Surnomoyee, this Court has extended the principle of that case, so as to make it applicable to the present.

The Subordinate Judge has held that the principle of that case is not applicable to the present, and we quite agree with him.

In Surnomoyee's case a patni was sold for arrears of rent under Act VIII of 1819. This sale was afterwards set aside for irregularity, and the patnidar was restored to possession. The zemindar then sued the patnidar to receive the back rents, and the patnidar pleaded that the suit was barred. The High Court here considered that it was so, but the Privy Council held otherwise, because until the patnidar had recovered possession of the patni the zemindar could not possibly have sued him for the rent. In fact, no rent became due as long as the patnidar was ousted of his rights; but it was only equitable that when those rights were restored to him, he should regain them only subject to the obligation to pay the back rents to the zemindar.

So again, in the case of *Dindyal Paramanik* v. *Radhakishori Debi* (1), decided by Chief Justice Couch and Mr. Justice Jackson in this Court, the plaintiff sued the defendant in the year 1872 to recover the rent due for the year 1871, and to eject him for non-payment. The litigation lasted till 1876, when the plaintiff obtained a decree for the rent, and also for ejecting the defendant if the rent was not paid within fifteen days. It depended entirely upon the defendant himself whether he paid the rent so decreed or not. If he did not, h' tenancy, in the opinion of the Court, would have ceased as from the time when the suit was brought. If he did, then the payment had the effect of restoring the tenancy.

Under these circumstances, the landlord sued in 1876 for the rent of 1872, and it was held that he was not barred, because until the defendant paid the rent, and so restored to himself the tenancy, the plaintiff had no cause of action for the back rent.

(1) 8 B. L. R., 536.

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In the case decided by Mr. Justice Jackson and Mr. Justice Mookerjee (1), it does not appear what the facts were; but from the language of the learned Judges, they certainly seemed to consider that the case came strictly within the principle laid down by the Privy Council.

In *Mohesh Chunder Chakladar* v. *Gungamoni Dossee* (2), decided by Mr. Justice Kemp and Mr. Justice Glover, we certainly have some difficulty in seeing how the Privy Council's decision could possibly have been made applicable; but the facts of that case are so totally dissimilar from those of the present that we do not feel at all bound by that judgment.

Most of these authorities are carefully considered by Mr. Justice Markby and Mr. Justice Mitter in the late case of *Watson & Co.* v. *Dhonendra Chunder Mookerjee* (3), and we entirely agree with the view which the learned Judges there take of the judgment of the Privy Council.

That judgment, properly understood, is in our opinion wholly inapplicable to a case like the present.

Here the plaintiff, whose ancestor purchased the rights of Government in 1860, ought to have known, when the defendant's ijara came to an end in 1866, what his true position was as against the defendants. The defendants set up against him these chukdari tenures; and if the plaintiff had made proper enquiries, he might have ascertained whether those tenures really existed. But he chose to ignore them, and to sue the defendants improperly (as it has turned out) for khas possession of the talook; and it is not because he has made a mistake, and by that mistake put the defendants to the cost and inconvenience of a long litigation, that he has a right now to claim immunity from the provisions of the Limitation Act.

If that were so, any man who mistakes his proper rights and remedies might with equal justice claim exemption from those provisions.

Take the ordinary case of a landlord giving his ryot notice to quit, and at the expiration of that notice bringing a suit to

(1) 16 W. R., 79. (2) 18 W. R., 59.
(3) I. L. R., 3 Calc., 13.

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——————, ss. 208 AND 364—*Application for Execution of Decree—Right of Appeal—Act XXIII of 1861, s. 11.*] Where a decree had been purchased *benami*, and the party alleging himself to be the real purchaser had not been put upon the record as a party, and an application for execution made by her under s. 208 of Act VIII of 1859 had been refused, and there was a dispute as to who was the real purchaser of the decree,—*Held*, that the applicant was not a party to the suit within the meaning of s. 11 of Act XXIII of 1861, and had no right of appeal against the order refusing her application.
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——————, ss. 212, 246 716
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ADMINISTRATOR-GENERAL'S ACT (XXIV OF 1867), s. 60, APPLICATION UNDER 340
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ADOPTION.] A Hindu wishing to adopt a son is under a moral obligation to adopt a brother's son, if such a person is in existence and capable of adoption,—*i. e.*, is not an only son: but a violation of this rule does not invalidate the adoption of any one else 587, 588

——————OF ONLY SON 413
See HINDU LAW.

AD VALOREM DUTY.] Executors obtaining a second grant of probate subsequent to the enactment of the Court Fees Act of 1870 (the first grant having been taken out previously to that

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enactment) are not exempted from the payment of the *ad valorem* duty chargeable under that Act, although the full fee then chargeable by law had already been paid at the time when the first probate was taken out.
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ADVERSE POSSESSION 224, 796
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ADVOCATE-GENERAL not a necessary party to a suit for management of religious endowment, although it is desirable that such suits should be brought only with his sanction or by leave of the Court 563
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———TRADE] Liability of an infant in respect of an ancestral trade carried by his guardian for his benefit 738
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———*Act XXIII of 1861 s. 11* 371
See ACT VIII OF 1859, ss. 208 AND 364.

———*Registration Act (XX of 1866) ss. 52, 53.*]
There is no appeal from a decree, nor from orders passed in execution of a decree made under s. 53 of Act XX of 1866.
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ARBITRATION, MATTER REFERRED TO—*Arbitrators doubting correctness of their decision—Award, validity and finality of—Appeal, right of—Act VIII of 1859, ss. 325, 327.*] Matters in dispute were referred to the arbitration of five persons, of whom four made their award on 27th August 1875. On 3rd September, the same arbitrators granted an application for re-hearing. Before the matter was re-heard, one of the four died, and an order striking off the application was made by two of the surviving arbitrators. On 21st February 1876, an application was made to the Court to have the award filed, which was opposed. The Court overruled the objection, and ordering the award to be filed gave a decree to the plaintiffs. *Held*, that the award was not a valid and final award, that the decree passed thereon was not final, and that an appeal would lie.
BOONJAD MATHOOR *v.* NATHOO SHAHOO 375

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ASSESSORS—*Trial by Jury of a case properly triable with Assessors—Appeal on facts—Act VIII of 1871, s. 80—Criminal Procedure Code (Act X of 1872), s. 233.*] *Per* MACLEAN, J. (MITTER, J., *dubitante*).—The trial by a jury of an offence triable with assessors is not invalid on that ground, but an accused who would have been entitled to an appeal on the facts, if the case had been tried with assessors, is not debarred from that right merely by the fact that the trial by jury is not invalid.
EMPRESS *v.* MOHIM CHUNDER RAI 765

ATTACHMENT OF MALIKANA RIGHTS IN EXECUTION OF DECREE—*Malikana Rights—Act VIII of 1859, ss. 235, 236, 237.*] *A* and *B* were entitled to receive annually and for ever a specified amount by way of malikana rights from the Collector as compensation for their extinguished rights in lakhiraj lands. In execution of a decree, *C*, on 13th September, purported to attach, under s 237 of Act VIII of 1859, *A's* share in such specified amount. Subsequent to this attachment, namely, on 23rd September 1873, *A* and *B* mortgaged their rights to the plaintiff. In a suit brought by him against *A* and *B* and *C*,—*held*, that attachment under s 237 was not applicable to a right to receive money for ever; that such an attachment is only good so far as it relates to any specific amount, which may be set forth in the request to the officer in whose hands the moneys are, as being then payable or likely to become payable, and that the attachment in question was therefore invalid.
Semble.—The attaching-creditor should have proceeded under s. 235 or s. 236. In either of such cases the defendant, the person to whom the money was payable, would be entitled to notice that he was not at liberty to alienate his rights.
NILKUNTO DEY *v.* HURRO SOONDEREE DOSSEE 414

ATTESTATION OF CONFESSION WHEN UNNECESSARY ... 756
See CONFESSION.

ATTORNEY AND CLIENT—*Fiduciary Relationship—Compound Interest—Rate of Interest—Taxation of Bills of Costs—Interest on Costs.*] The plaintiff, an attorney of the High Court, made

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advances to the defendant, a banker and merchant, for whom he had been, and was then acting, in certain litigation in which the defendant was engaged in the High Court At the time of the first loan in 1869, the defendant was considerably indebted, and one creditor had issued execution against his property, and he also owed the plaintiff a large sum for costs, for which, however, up to that time, no bills of costs had been delivered. Before the first loan the plaintiff delivered bills for all his costs then due, of which some were incurred in completed, and others in pending, suits, and offered to have them taxed; but the defendant then said there was no need for taxation, which would only increase his expenses. The advances were made on the security of mortgages executed by the defendant. The first was executed in August 1869, and the principal was repayable in February 1871. Interest was to be payable at 12 per cent per annum, and compound interest at the same rate was also to be charged on all interest in arrear In September 1870, a further advance on the same terms was made, and a further mortgage executed, which included the original sum, with the interest then due, and the further advance. Further advances were made in the same way in October 1871 and March 1876. In all these transactions the defendant had no independent professional advice, and the mortgages were prepared in the plaintiff's office, but not charged for. In a suit to recover the sum due on the mortgages by sale of the mortgaged property, the plaintiff abandoned any accumulation of interest since the date of the third mortgage. *Held*, that the defendant, notwithstanding he had declined the offer of the plaintiff in 1869 to tax the bills, and notwithstanding the delay that had taken place, was entitled (having regard to the relation between the parties, and to the fact that a portion of the costs was incurred in suits then pending) to have the bills taxed and to re-open the account. Under the circumstances, the Court would not infer acquiescence from the delay on the part of the defendant, nor did the plaintiff's offer to tax, and the defendant's refusal of that offer, debar the defendant of his right to have the bills taxed in the usual way. *Held* also, that there is no rule which prevents an attorney from taking security or otherwise arranging with his client for the payment of costs which have actually become due, and that the plaintiff was entitled to sale of the property, to accumulations of interest prior to the date of the third mortgage calculated by allowing annual rests, to interest at 10 per cent. as being a fair rate for the client to have undertaken to pay when the mortgages were executed, and to interest on his costs.

MONOHUR DOSS *v.* ROMANAUTH LAW 473

AUTHORITY TO SIGN ON BEHALF OF OTHERS, PROOF OF 557

See DOCUMENT MORE THAN THIRTY YEARS OLD, PRESUMPTION AS TO.

AWARD, VALIDITY AND FINALITY OF 375

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BANK OF BENGAL ACT (XI OF 1876), ss. 17, 21—*Registration of Transfer—Right of Bank to refuse to register.*] The Bank of Bengal is entitled to refuse to register a transfer of shares when the application is made during the time the transfer books of the

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COMMITTAL FOR TRIAL AFTER CHARGE HAS BEEN DRAWN UP 495
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COMPANY, ACTS DONE BY DIRECTORS OF, IN EXCESS OF AUTHORITY 280
See RATIFICATION.

COMPOUND INTEREST 473
See ATTORNEY AND CLIENT.

CONFESSION—*Attestation when unnecessary*] The attestation required by s. 346 of the Criminal Procedure Code is unnecessary when a confession is made in Court to the officer trying the case at the time of trial.
IN THE MATTER OF CHUMMAN SHAH 756

CONFLICT OF OPINION BETWEEN INDIVIDUAL JUDGES 20
See JURISDICTION OF CIVIL COURT.

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See DIVORCE ACT (IV OF 1869).

CONSTRUCTION, RULES OF—*Grant for an indefinite period.*] The rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey.
LEKHRAJ ROY *v.* KUNHYA SINGH 210

CONSTRUCTIVE POSSESSION THROUGH INTERMEDIATE HOLDERS 320
See CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 530.

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See SALE FOR ARREARS OF REVENUE, SUIT TO SET ASIDE.

CONTRACT, ALTERATION OF, AFTER SIGNATURE—*Contract Act (IX of 1872), s 37.*] To a contract between the plaintiffs and the defendant, for the purchase by the defendant of a cargo of salt, the plaintiffs, after the contract had been signed by the defendant, added in the margin: "Ten days' demurrage will be allowed at Rs. 250 per diem." *Held*, that the addition of the words in the margin did not amount to an alteration within the rule of English law: the alteration must be either something which appears

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CRIMINAL PRACTICE—*Distinct Offences—Separate Charges—Act X of 1872, ss. 532, 533, 554 Illus. b, 555.*] Section 453 of the Criminal Procedure Code simply places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in the section, however, to prevent an accused from being separately charged and tried on the same day for any number of distinct offences of the same kind committed within the year.

BUTTY *v.* DHONONJOY BARAJ 540

———*Committal for trial after charge has been drawn up—Criminal Procedure Code (Act X 1872), ss. 220, 221.*] Section 221 of the Criminal Procedure Code authorizes a Magistrate, after a charge has been drawn up, to stop further proceedings, and commit for trial.

Although the explanation to s. 220 provides that, if a charge is drawn up, the prisoner must be either convicted or acquitted, it does not require that the conviction or acquittal should be by the Magistrate who drew the charge.

EMPRESS *v.* KUDRUTOOLLAH 495

CRIMINAL PROCEDURE CODE (ACT X OF 1872), ss. 4, 8, 148, 149. 222 336

See OFFENCE PUNISHABLE BY FINE AND CONFISCATION.

———, *s. 215 Evidence for the Prosecution—Examination of Witnesses.*] A Magistrate is bound, before he discharges an accused person under s. 215 of the Criminal Procedure Code, to examine all the witnesses, and should not refuse to examine witnesses simply because their evidence will be to the same effect as that already taken for the prosecution.

EMPRESS *v.* HEMATULLA 389

———, s. 263—*Disagreement in finding of Jurors—Dissent of Judge from Verdict of Majority—High Court, Power of.*] An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head, causing death. *Held* that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.

Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X of 1872, the High Court is competent to find the prisoner guilty notwithstanding an acquittal by the majority of the jury.

It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which, in in his opinion, has been committed.

EMPRESS *v.* SAHAE RAE 623

———*High Court, Power of—Jury, Verdict of Acquittal by.*] Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code,—*held,* that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

EMPRESS *v.* HARAI MIRDHA 189

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———————————————, s. 518 *et seq* ... 20
See JURISDICTION OF CIVIL COURT.

———————————————, s. 530—*Constructive Possession—Intermediate holders.*] In a case of disputed possession between two rival zemindars, constructive possession through intermediate holders (*ticcadars*), to whom the ryots pay rents, is not such possession as is contemplated by s. 530 of the Code of Criminal Procedure.
EMPRESS *v.* THAKOOR DYAL SING 320

——————— TRESPASS.] One of two or more joint owners pulling down an erection built on the joint property by another joint owner without his or their consent is not guilty of 576
See LAND HELD BY JOINT OWNERS.

——————— TRIAL 623
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DAUGHTER'S SON, treatment as a son by Oudh Talukdar, effect of 626
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———, OBTAINED *EX PARTE* 383
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———, OF COURT OF FIRST INSTANCE, when it may be modified on appeal though the appeal was by one only of several defendants 738
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See DIVORCE ACT (IV OF 1869).

DELEGATION, POWER OF 63
See JURISDICTION OF HIGH COURT.

DESERTION 485
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DILUVIATED LANDS—*Adverse Possession—Doctrine in Lopez's Case.*] The doctrine in *Lopez's Case* that diluviated lands, re-forming on their old site, remain the property of their original owner, does not apply to lands, in which after their re-formation an indefeasible title has been acquired by long adverse possession, or otherwise.

Where a plaintiff relies on an alleged adverse possession of lands for more than twelve years after their re-formation, the question to be decided is whether he has had such possession for twelve years.
RADHA PROSHAD SINGH *v.* RAM COOMAR SINGH 796

DISCHARGE OF SURETY 174
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DISTRICTS, IMMOVEABLE PROPERTY SITUATE IN DIFFERENT—Leave to admit plaint 370
See PRACTICE.

DIVORCE ACT (IV OF 1869)—*Desertion*]. In a suit by a wife for a dissolution of her marriage on the ground of her husband's adultery and desertion, the adultery was proved, and it was found that the wife, notwithstanding the gross misconduct of her husband, continued to live with him for some years, during which time she supported her husband and herself by her own earnings, he contributing nothing to her support; that eventually, under the pressure of pecuniary difficulties brought about by her husband's extravagance and dissolute habits, they came to an arrangement, by which she went to live with her friends and he resided at his mother's house, until they could again find means to provide a common house; that for two years previously to the separation, though they had lived together, no conjugal intercourse owing to the husband's misconduct had taken place between them; that he left his mother's house without telling his wife where he was going, and subsequently went to Madras, where he had since resided. Held in the Court below, following the case of *Fitzgerald* v. *Fitzgerald*, that the separation having originally been by mutual consent, desertion could not take place until cohabitation had

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been resumed; desertion not being proved, the wife was only entitled to a decree for judicial separation. *Held* in appeal that the separation not being brought about by the act of the wife, but by the husband's misconduct, distinguished the case from that of *Fitzgerald* v. *Fitzgerald*, and that, under the circumstances, the desertion was proved, and the petitioner was entitled to a decree for a dissolution of marriage.
WOOD *v.* WOOD 485

DIVORCE ACT (IV OF 1869), s. 14—*Delay—Connivance—Rebuttal of Presumption.*] Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the Court looks to when the charge of adultery is preferred, is, whether there has been such delay as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it; but any presumption arising from apparent delay may always be rebutted by an explanation of the circumstances.
WILLIAMS *v.* WILLIAMS 688

——————ESTABLISHED CUSTOM OF 305
See HINDU LAW.

DOCUMENT MORE THAN THIRTY YEARS OLD, PRESUMPTION AS TO—*Act I of 1872, s. 90—Authority to sign on behalf of others, Proof of.*] The plaintiffs sued the defendants for enhancement of rent. The defendants resisted the claim, relying, *inter alia*, on a mokurrari potta executed on 9th October 1832. This potta purported to bear the seal of one of the then maliks of the lands, and also purported to be signed on behalf of all the maliks by *A*. *Held*, that although the potta might be an authentic document, it would not bind the maliks who did not affix their seals, nor those who claimed under them, unless it was shown that *A* had a special authority to sign the names of such maliks to it, or a general authority to sign on their behalf documents of the same description as the potta, and that until such proof was given, the document was not admissible in evidence. *Held* further, the fact that the potta was more than thirty years old gave rise to the presumption that the signature at the foot of it was in the handwriting of *A*, and that the potta was executed by him; but that to make it evidence against the representatives of the maliks who had not executed it, the defendants should show that *A* had authority to sign their names.
UBILACK RAI *v.* DALLIAL RAI 557

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See STAMP ACT (XVIII OF 1869), ss. 34 AND 41.

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See KABULIAT, SUIT FOR.

ENHANCEMENT OF RENT 251
See GHATWALI TENURE.

———————*Notice—Beng. Act VIII of 1869, s 14-Res judicata.*] A lease from generation to generation gave the boundaries of the land leased, estimated the area thereof, and fixed a certain rent per bigha. It contained a condition that, if on measurement the actual quantity of land should turn out to be either more or less than the estimated area, the rent should be increased or decreased in proportion at the same rate per bigha. In a suit for enhancement of rent, on the ground that the land leased contained more than the estimated number of bighas, the lease being one which did not specify the period of the engagement,—*Held* that notice of enhancement was necessary under Beng. Act VIII of 1869, s. 14.

In a previous suit the present plaintiff had sued the defendant for the amount of rent originally fixed in the lease, and the defendant claimed in that suit to have the rent reduced in accordence with the terms of the lease, and a measurement was thereupon made, which showed that the quantity of land held by the defendant was in excess of that named in the lease: that suit was decided in favour of the plaintiff for the rent claimed. *Held*, that the measurement adopted by the Court in the former suit was not, as regards the amount of the excess, binding upon the defendant, and that, even if it were, the fact of such measurement would be no sufficient notice of enhancement to the defendant.
EKRAM MUNDUL *v.* HOLODHUR PAL. 271

———————SUIT, PENDENCY OF 791
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EQUITABLE MORTGAGE 174
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ERECTION OF BUILDINGS BY TENANT-AT-WILL, OR FROM YEAR TO YEAR 696
See LANDLORD AND TENANT.

ERROR IN STATEMENT OF ACCOUNT 602
See INTEREST ON DECREES.

EVIDENCE ACT (I OF 1872), s. 92 174
See PRINCIPAL AND SURETY.

———————, ss. 101, 103, 106—*Onus of Proof*] In the year 1862, the plaintiff brought a resumption suit against *A* in respect of the lands in dispute in this case, upon the ground that she was holding them by an invalid lakheraj title, and obtained a decree. After some years the plaintiff brought the present suit against *B*, who derived her title through *A*, to have the rent assessed. *B* pleaded by way of bar to the jurisdiction, that the lakheraj grant, under which *A* claimed, was made previously to 1790. *Held*, that the onus of proving this plea was upon *B*.
HEERA LALL PRAMANICK *v* BARIKUNNISSA BIBEE ... 501

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——————*Limitation—Act VIII of 1859, ss. 212, 246—Act IX of 1871, sched. ii, art. 167.*] Within three years of his first application in execution of a rent-decree, *A*, the judgment-creditor, made a second application to sell certain lands, the alleged property of *B*, the judgment-debtor. Third parties intervened, who established their claim to the land. *A* thereupon brought a regular suit, and succeeded in obtaining a decree, declaring the lands in suit to be the property of *B*. Within a year of the date of this decree, but more than three years after his first application for execution. *A* filed a third application for attachment of *other lands* belonging to *B*. *Held*, the application was barred by limitation.
RAMSOONDER SANYAL *v.* GOPPESSUR MOSTOFEE 716

——————*Privy Council Order awarding costs—Interest on Costs—Act XXIII of 1861, ss. 10 and 11.*] Where an order passed by Her Majesty in Council on report of the Judicial Committee awards costs, but is silent as to interest on the costs so awarded, it is not competent to the Court which has to execute the order to direct payment of the costs with interest.
The principle of the decisions in cases arising under ss. 10 and 11 of Act XXIII of 1861, which have established a similar rule of practice in executing decrees passed by the Courts in India, approved.
Interest not provided for in the order of the Privy Council may, however, be allowed in execution where the parties have agreed to submit the matter to the discretion of the Court executing the order.
FORESTER *v.* THE SECRETARY OF STATE 161

——————*Transfer of Decree—Jurisdiction—Act VIII of 1859, ss. 285, 286.*] The jurisdiction of a Court to which a decree has been transferred for execution is strictly limited to carrying out such execution. Such Court has no power to issue a certificate under ss. 285, 286 of Act VIII of 1859 transferring the decree already transferred to it to another Court for execution. The Court to which a decree has been properly transferred for execution having struck the case off the file, a subsequent application for a further transfer of the case to another Court for execution should be made to the Court which originally passed the decree sought to be executed.
SHIB NARAIN SHAHA *v.* BIPIN BEHARY BISWAS 512

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EXECUTION OF DECREE, APPLICATION FOR 518
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——————*Interest on Costs.*] Where a decree gives interest upon the principal sum recovered only, and no mention is made as to interest on costs, the successful party is not entitled to such interest.
MAHTAB CHUNDER BAHADOOR *v.* RAM LALL MOOKERJEE ... 351

——————*Limitation.*] The words "no process of execution of any description whatsoever shall be issued on a judgment in any suit.....after the lapse of three years" in s. 58 of Beng. Act VIII of 1869 mean that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. Therefore, where on an application made on 5th July 1875 for execution of a decree for arrears of rent obtained on the 31st January 1873, a warrant for the arrest of the judgment-debtors was issued, but not executed, a subsequent application for execution of the same decree made on 17th March 1876 was held not to be barred.
The law as laid down in *Khidoy Krishna Ghose* v. *Kailas Chandra Bose* is not affected by the Circular Order No. 18, dated 10th July 1874.
GOLOKEMONEY DABIA *v.* MOHESH CHUNDER MOSA ... 547

——————OF DOCUMENTS 324
See PURDAH WOMEN.

——————SALE 335
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——————UNDER ACT VIII OF 1859, ss. 204 & 342 ... 318
See SECURITY BOND.

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See MORTGAGE, EFFECT OF SUBSEQUENT MORTGAGE.

EXTRAORDINARY JURISDICTION.] The High Court cannot interfere in the exercise of its extraordinary jurisdiction, unless all other remedies provided by law have been previously exhausted ... 574

FACTORY, LIABILITY OF CREDITOR OF 231
See INDIGO FACTORIES.

FIDUCIARY RELATIONSHIP 473
See ATTORNEY AND CLIENT.

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See MITAKSHARA LAW.

——————, NOTIFICATION OF 397
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FRAUD 504, 300
See POSSESSION, SUIT FOR. SALE FOR ARREARS OF REVENUE, SUIT TO SET ASIDE.

FRESH SUMMONS—*Limitation* 312
See PRACTICE.

GENERAL CLAUSES ACT (I OF 1868), s. 6 727
See REGISTRATION.

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GHATWALI TENURE—*Grants prior to Permanent Settlement—Reg. VIII of 1793, s. 51, cl. 1—Enhancement of Rent.*] Where grants of land had been made prior to the Permanent Settlement on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the services on the part of the zemindar.—*Held*, in a suit by the zemindar to enhance the rents, that as long as the ghatwals were able and willing to perform the services, the zemindar had no right to enforce payment of an enhanced rent on the ground that the services were no longer required.

The ghatwals are dependent talookdars within the meaning of Reg. VIII of 1793, and are protected from enhancement by cl. 1 of s. 51 of that Regulation.

LEELANUND SINGH BAHADOOR *v.* THAKOOR MUNRUNJUN SINGH 251

GOODS OBTAINED BY OFFENCE OR FRAUD 264
See JURISDICTION.

GOVERNMENT CURRENCY NOTE, THEFT OF—*Title of Original Owner—Appealable Order—Criminal Procedure Code (Act X of 1872), ss. 418 & 419—Cashing a Currency Note—Sale—Contract Act, ss. 74, 76, and 108.*] A Government currency note was stolen from *A*, and cashed by *B* in good faith for C. On the conviction of C for theft, the Magistrate ordered the note to be given to *B*. *A* appealed to the Sessions Judge, who was of opinion that he was not competent to interfere as a Court of appeal under s. 419 of the Criminal Procedure Code; but submitted the case for the orders of the High Court.

Held, that the case could be disposed of by the Judge under s. 419 of the Criminal Procedure Code, and that the words "Court of appeal" in that section are not necessarily limited to a Court before which an appeal is pending.

Held, further, that the provisions of s. 76 of the Contract Act did not apply, as the change of a currency note for money is not a contract of sale, and that, as the note came honestly into the hands of *B*, the order of the Magistrate was right.

EMPRESS *v.* JOGESSUR MOCHI 379

GRANT FOR AN INDEFINITE PERIOD 210
See CONSTRUCTION, RULES OF.

———IN LIEU OF MAINTENANCE 793
See LIMITATION.

GROUNDS OF APPEAL NOT TAKEN IN MEMORANDUM OF APPEAL 612
See SUIT BY PERSON IN POSSESSION OF LAND TO ESTABLISH TITLE.

HIGH COURT, POWER OF 189
See CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 263.

HINDU EXCLUDED FROM JOINT FAMILY PROPERTY, SUIT BY 228
See PRACTICE.

———LAW—*Adoption of only Son—Sudras.*] The adoption of an only son is invalid according to the Bengal school of Hindu law, and the prohibition applies as well to Sudras as to the higher castes.

MANICK CHUNDER DUTT *v.* BHUGGOBUTTY DOSSEE ... 443

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HINDU LAW—*Ancestral trade carried on for benefit of Infants—Liability of Infant—Contract Act (IX of 1872), s. 247—Act X of 1877, s. 544.*] Where the ancestral trade of a Hindu was carried on after his death for the benefit of his infant children by their guardian, and debts were incurred by the firm in the course of business,—*Held*, that the guardian of a Hindu minor is competent to carry on an ancestral trade on behalf of the minor, and that, following the analogy of the rule laid down by s. 247 of the Contract Act, as to the liability of a minor admitted by contract into a partnership business, the minor is not to be held personally liable for the debts incurred in such trade, but that his share therein is alone liable

The Court of appeal has power, under s. 337 of Act VIII of 1859 (corresponding with s. 544 of Act X of 1877), to draw up what would be a fair decree as regards all the parties to a suit, although some of them may not have appealed.

JOYKISTO COWAR *v.* NITTYANUND NUNDY 738

———*Benares School—Succession—Priority of Indigent Daughter—Barren Daughter—Adoption—Dwyamushyana—Son of Brother—"Factam valet."*] In the case of inheritance by daughters on default of nearer heirs, no preference is awarded by the authorities recognized by the Benares school of Hindu law in Upper India to a daughter who has, or is likely to have, male issue, over a daughter who is barren or a childless widow.

Passages in the Dattaka Mimansa and the Dattaka Chandrika, which prescribe that a Hindu wishing to adopt a son shall adopt the son of his brother, if such a person be in existence and capable of adoption, in preference to any other person, although binding upon the conscience of pious Hindus as defining their duty, are not so imperative as to have the force of laws, the violation of which should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

The maxim *quod fieri non debuit factum valet* is recognized to some extent by other schools of law in India besides that of Bengal.

Semble.—Under the law of the Benares school a married daughter who is indigent succeeds to the inheritance of her deceased father in preference to a married daughter who is wealthy.

WOOMA DASEE *v.* GOKOOLANUND DASS 587

———*Divorce—Established Custom.*] Where a Hindu husband sued his wife for restitution of conjugal rights, and the defendant pleaded divorce, it was *held*, that though the Hindu law does not contemplate divorce, still in those districts where it is recognized as an established custom, it would have the force of law.

KUDOMEE DOSSEE *v.* JOTEERAM KOLITA 305

———*Joint Family—Joint Estate—Presumption.*] In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is, that every thing in the possession of any one member of the family belongs to the common stock. The onus of establishing the contrary rests on him who alleges separate property.

But this presumption does not arise where it appears that there has been a division of the family property and a separation in the family, all the members of which are living separately.

BANNOO *v.* KASHEE RAM 315

———*Mitakshara—Execution—Sale of interest of one of several co-sharers in a joint estate.*] The right, title, and interest of one co-sharer in joint ancestral estate may be attached and sold in

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execution to satisfy a decree obtained against him personally, under the law of the Mitakshara, as well in Bengal as in Bombay and Madras.

The purchaser at such a sale acquires merely the right to compel a partition as against the other co-sharers which the judgment-debtor possessed.

Quære.—Whether, under the law of the Mitakshara, in Bengal, a voluntary alienation by one co-sharer, without the consent of the rest, of his undivided share in joint ancestral property is valid?

DEENDYAL LAL *v.* JUGDEEP NARAIN SINGH 198

HINDU LAW—*Mitakshara—Son's Interest in Ancestral Estate—Burden of Proof.*] In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother: and that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority.

Held that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest.

Held also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council in *Girdhare, Lall* v. *Kantoo Lall*, not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which the alienation was made, was incurred for an immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was.

Quære.—Is a son bound to discharge debts of the father which are illegal, though not immoral?

ADURMONI DEVI *v.* CHOWDHRY SIB NARAIN KUR ... 1

———*Partition—Share of Mother on Partition among Sons—Deceased Son.*] On a partition among her sons, a mother is entitled to obtain a share as representative of a deceased son, as well as one in her own right.

JUGOMOHAN HALDAR *v.* SARODAMOYEE DOSSEE 149

HOLDINGS NOT LIABLE TO ENHANCEMENT (GUZASTHA KASHT)—*Suit for removal of Buildings—Occupancy Rights not transferable—Beng. Act VIII of 1869, ss. 3, 4, 6.*] The statutory right of occupancy under Beng. Act VIII of 1869 cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although the Court in such cases will be disposed to place a liberal interpretation on the rights of the tenant, it will not sanction a complete change in the mode of enjoyment.

LAL SAHOO *v.* DEO NARAIN SINGH 781

HUNDI—*Notice of Dishonour.*] Previous formal written notice of dishonour of a hundi is not necessary before suit brought, unless it can be shown that the parties charged have been prejudiced by such omission.

GOBIND RAM MARWARY *v.* MATHOORA SABOOYA 339

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ILLEGITIMATE SON 214
See MITAKSHARA.

IMMOVEABLE PROPERTY SITUATE IN DIFFERENT DISTRICTS, LEAVE TO ADMIT PLAINT 370
See PRACTICE.

INADEQUACY OF CONSIDERATION—*Suit to set aside Deed.*] A party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition.
ADMINISTRATOR-GENERAL OF BENGAL *v.* JUGGESWAR KOY ... 192

INDEFINITE PERIOD, GRANT FOR 210
See CONSTRUCTION, RULES OF.

INDIAN CONTRACT ACT, S. 20, AND S. 23, CL. 2 602
See INTEREST ON DECREES.

INDIGO FACTORIES—*Mortgage—Liability of Creditor of Factory—Lien by Custom.*] A sold to B, the proprietor of an indigo concern, of which *C* was a mortgagee, certain bags of indigo seed. The agreement of sale contained no provision pledging the crop of indigo, the product of the seed, as a security for its price. Subsequent to the sale, and after the seed had been planted, *C*, under a decree on his mortgage, obtained possession of *B's* factory. In a suit by *A* against *B* and *C* for the price of the indigo seed, *held* that, in the absence of any agreement by *C* to pay the debts of *B*, *C* could not be held liable.
There is no lien by custom upon an indigo factory, or upon the produce of an indigo factory, in respect of any debts of the factory.
MONOHUR DASS *v.* MCNAGHTEN 231

INHERITANCE.] The Benares school gives no preference to a daughter who has or is likely to have male issue over a daughter who is barren or a childless widow 587
See HINDU LAW.

INJUNCTION TO RESTRAIN USE OF TRADE-MARK ... 417
See TRADE-MARK

INSOLVENCY—*Order and Disposition—Insolvent Act (11 and 12 Vict., c. 21), s. 24—Goods pledged by Insolvent and re-delivered to him on Commission Sale.*] *M.*, who carried on the business of a watch and clock-maker in Calcutta, borrowed from *D.M.* Rs. 6,000, for which he gave a promissory note, and, as collateral security for the payment of which sum, he pledged certain articles consisting of watches, clocks, &c., with *D M.* The articles remained for some months in the custody of *D. M.*, who then re-delivered them to *M.* for sale on commission, the proceeds to be applied in liquidation of the debt. *M* gave a receipt for the articles, and some of them were sold by *M.* on those terms. On the 2nd of May 1877, *M* filed his petition in the Insolvent Court, and such of the articles as remained unsold came into the possession of the Official Assignee. On an application by *D M.* claiming the articles and praying for an order directing the Official Assignee to return them, it was alleged that it was customary for European jewellers in Calcutta to receive articles on commission sale, and it was contended that such receipt did not divest the true owners of possession *Held*, the

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articles were rightly vested in the Official Assignee. On the facts, the insolvent was the true owner of the goods D. M.'s interest ceased when he ceased to have possession of the goods; the receipt in this view only amounted to an agreement to sell and apply the proceeds in liquidation of the debt, and it could have been proved and a dividend recovered on it under the insolvency. Even if the interest of *D. M.* did not cease, the goods were in the order and disposition of the insolvent, there being nothing to show any publicity or notoriety in the change of possession of the goods. No amount of evidence would convince the Court that there was a custom of purchasing goods from a retail-dealer and leaving them with him for commission sale. *Semble*—No such arrangement would be upheld as against the Official Assignee.

IN RE MURRAY, AN INSOLVENT. EX PARTE DWARKANATH MITTER 58

INSOLVENT ACT (11 AND 12 VICT, C. 21), S 26—*Voluntary Conveyance—13 Eliz, c. 5.*] Where an order had been made under s. 26 of the Insolvent Act calling on a certain person to show cause why she should not hand over to the Official Assignee money which it was alleged the insolvent had paid to her shortly before his insolvency under circumstances which might make the transaction void against the creditors,—*Held* in the Court below, that the transaction was a gift, and, under the circumstances, void as against the creditors, within the Statute 13 Eliz, c. 5. *Held* also, that the word 'property' in s. 26 of the Insolvent Act includes money.

Held, on appeal, that the matter was not one which could properly be dealt with under the 26th section of the Insolvent Act, as it involved difficult questions of title.

IN THE MATTER OF UMBICA NUNDUN BISWAS 434

INSUFFICIENTLY STAMPED DOCUMENT—*Act XVIII of 1869, s. 20—Admission by Court—No Right of Appeal.*] The question of the admissiblity of an insufficiently stamped document once admitted as evidence by a Court can form no valid ground of appeal.

KHOOB LALL *v.* JUNGLE SINGH 787

INTEREST ON COSTS 161, 351

See EXECUTION. EXECUTION OF DECREE.

——— ON DECREES—*Indian Contract Act. s. 20 and s. 23, cl. 2—Mistake of Fact and of Law—Error in Statement of Account.*] Where a decree is silent as to future interest, interest cannot be recovered by proceedings in execution of the decree, but it may be recovered as damages by a separate suit.

Where the property of a judgment-debtor had been attached in execution for a sum claimed to be due under a decree, but which sum in fact included interest not awarded by the decree,—*held*, that an agreement, whereby the debtor obtained the release of his property on condition of paying by instalments the entire amount claimed inclusive of the interest, was not unlawful and void under cl. 2, s. 23 of the Indian Contract Act; and that the mistaken belief of the parties to the agreement that interest could be recovered by proceedings in execution was not a mistake of fact rendering the agreement voidable under s. 20 of that Act

In a written agreement by a debtor to pay his debt by instalments, securing the payment by a mortgage of land, the amount of the debts was erroneously stated to be greater than it actually

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was. In a suit on the agreement, *held* that such an error was ground for reforming the account, but not for setting aside the agreement.
SETH GOKUL DASS GOPAL DASS *v.* MURLI 602

INTEREST ON MESNE PROFITS—*Act XXXII of 1839.*] By the law and practice in India, independently of the provisions of Act XXXII of 1839, a decree might award interest, as of course, on mesne profits from the date of the institution of the suit in which they were claimed. Such interest is not forbidden by the terms of the Act referred to.
HURROPERSAUD ROY *v.* SHAMAPERSAUD ROY 651

———, RATE OF 473
See ATTORNEY AND CLIENT.

INTERMEDIATE HOLDERS, CONSTRUCTIVE POSSESSION THROUGH 320
See CRIMINAL PROCEDURE CODE (ACT X OF 1872). s. 530.

INTERPRETATION OF STATUTES 47
See LIMITATION ACT (XIV OF 1859), ss. 20, 21.

JALKAR—*Easement—Dispossession—Limitation Act (IX of 1871), s. 22, sched. ii, art. 145.*] A jalkar is not an easement within the meaning of s. 27 of Act IX of 1871, but is an interest in immovable property within the meaning of sched. ii, art. 145 of that Act. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff for more than twelve years, *held*, that a suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation.
PARBUTTY NATH ROY CHOWDHRY *v.* MUDHO PAROE ... 276

JOINDER 541
See PRACTICE.

JOINT CONTRACTORS, SUIT AGAINST—*Res Judicata—Contract Act (IX of 1872), s 43*] A suit in which a decree has been obtained against one of several joint makers of a promissory note, is a bar to a subsequent suit against the others. The effect of s. 43 of the Contract Act is not to create a joint and several liability in such a case. That section merely prohibits the defendant in such a suit pleading in abatement, and thus places the liability arising from the breach of a joint contract and the liability arising from a tort on the same footing.
The rule laid down in the case of *King* v. *Hoare* and *Brinsmead* v. *Harrison* is one of principle, not merely of procedure.
HEMENDRO COOMAR MULLICK *v.* RAJENDROLALL MOONSHEE 353

——— ESTATE, PRESUMPTION AS TO 315
See HINDU LAW.

———, SALE OF INTEREST OF ONE OF SEVERAL CO-SHARERS IN 198
See HINDU LAW.

——— FAMILY 315
See HINDU LAW.

JUDICIAL PROCEEDING 742
See REPORT BY MAGISTRATE.

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JURISDICTION 512
See EXECUTION.

——————*Appeals—Sonthal Parganas—Act XXXVII of 1855, ss. 2, 4,—Act XIV of 1874—Act XV of 1874.*] The High Court has no jurisdiction to entertain appeals in civil suits tried in the Sonthal Parganas.
SURDHAREE LOLL *v.* MANSOOR ALLY KHAN 298

——————*Bench of Magistrates*] A Bench of Magistrates has no power to deal with cases coming under s. 530 of the Criminal Procedure Code. A Bench may be empowered under s. 50 of the Code "to try such cases or such class of cases only and within such limits as the Government may direct." The definition of the term "trial" shows that it refers to trials for offences, and these do not come within the miscellaneous matters mentioned in s. 530.
SUFFERUDDIN *v.* IBRAHIM 754

——————*Cause of Action—Goods obtained by Offence or Fraud—Contract Act (IX of 1872), s. 178—Bailment—Pawnor and Pawnee.*] *G* went to the plaintiff's place of business in Calcutta, and representing to him that he wanted some jewellery on inspection, and would purchase it if he did not return within ten days, obtained from the plaintiff a quantity of jewellery depositing as security Rs. 2,000 with the plaintiff. *G*, having thus obtained the jewellery, took it to *K*, at his residence, which was out of the local limits of the jurisdiction of the Court, and pledged the jewellery to *K* for Rs. 6,000. In a suit brought against *G* and *K* to recover the jewellery or its value, *G* did not appear, and *K* alone defended the suit. *Held*, that it being, with reference to s. 178 of the Contract Act, an essential element in the plaintiff's case that the jewellery had been obtained from the plaintiff by fraud in Calcutta, part of the cause of action against *K* arose in Calcutta, so as to enable the Court, leave having been obtained under cl. 12 of the Charter, to entertain the suit against him.

Held also, that the plaintiff was entitled to recover the jewellery from *K*, under s. 178 of the Contract Act, *G* having obtained it from the plaintiff by an offence or fraud within the meaning of that section.
KARTICK CHURN SETTY *v.* GOPALKISTO PAULIT 264

——————*Rent Suit under Rs. 100—Special Appeal—Beng. Act VIII of 1869, ss. 33, 34, 102—Act VIII of 1859, s. 372.*] *Held* by the Court (JACKSON, J., dissenting), that no appeal lies to the High Court from the decision of a District Judge in a suit for rent under Rs. 100, when no question of right to enhance or vary the rent of a raiyat or tenant, nor any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment.
LUNGESSUR KOOER *v.* SOOKHA OJHA and RADHAY KISHAN *v.* KALI MISSER 151

——————OF CIVIL COURT—*Encroachment on Public Thoroughfare—Special Damage—Abatement of Nuisance Criminal Procedure Code (Act X of 1872), s. 518 et seq—Right to a Jury—Practice—Conflict of Opinion between individual Judges—Reference to Full Bench.*] Where special damage is caused to any person by an obstruction placed upon a public thoroughfare, he is entitled to bring an action in the Civil Court for the purpose of having the nuisance abated, notwithstanding the provisions of

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s 518 and the following sections of the Criminal Procedure Code for summary proceedings before a Magistrate, and notwithstanding that he may be entitled to damages.

A question arising from a conflict of opinion between individual Judges is not, properly speaking, the subject of reference to a Full Bench.

RAJ KOOMAR SINGH *v.* SAHEBZADA ROY 20

JURISDICTION OF HIGH COURT - *Act VI of 1835 — Act XXII of 1869, s. 9—24 & 25 Vict., c. 67, s. 22; c. 104, ss. 9, 11, & 13—3 & 4 Will. IV, c. 85—16 & 17 Vict., c. 95—17 & 18 Vict, c. 77—Delegation, Power of.*] By Act XXII of 1869 certain districts were removed from the jurisdiction of the High Court, and by s. 5 the administration of Civil and Criminal justice was vested in such officers as the Lieutenant-Governor of Bengal should appoint. By s 9 the Lieutenant-Governor was empowered to extend all or any of the provisions of the Act to the Cossyah and Jynteeah Hills. By a notification in the *Calcutta Gazette* of 4th October 1871, the Lieutenant-Governor extended the provisions of the Act to the Cossyah and Jynteeah Hills, and directed that the Commissioner of Assam should exercise the powers of the High Court in the Civil and Criminal cases triable in the Courts of that district. The two prisoners were tried for murder in April 1876, and were on conviction sentenced by the Chief Commissioner of Assam to transportation for life. On appeal by the prisoners to the High Court, *held* by the majority of a Full Bench (GARTH, C. J., MACPHERSON and PONTIFEX, JJ., dissenting), that the High Court had jurisdiction to entertain the appeal, and such jurisdiction was not taken away by Act XXII of 1869.

Per Curiam —The Governor-General in Council had power by legislation to remove the districts from the jurisdiction of the High Court.

Per JACKSON, AINSLIE, and MARKBY, JJ., (KEMP, J., concurring).—The Governor-General in Council had no power to delegate his legislative functions to the Lieutenant-Governor of Bengal in the way he had done in Act XXII of 1869. The power of delegation cannot be considered as validated by any long course of practice, nor as sanctioned by the tacit recognition of Parliament: Act XXII of 1869 is therefore so far invalid.

Per MACPHERSON, J. (PONTIFEX, J , concurring).—Such delegation is no where expressly prohibited, and does not bring the Act under any of the restrictive provisions of the Indian Council's Act.

Per GARTH, C. J., and MACPHERSON, J. (PONTIFEX, J., concurring).—The power of delegation now questioned had been exercised in many cases for a series of years previous to the passing of the Indian Council's Act, and that Act (the framers of which must have been cognizant of such course of practice) must be taken as impliedly approving of and sanctioning such practice, which it would otherwise have declared illegal.

Per GARTH, C. J., JACKSON, MARKBY, and AINSLIE, JJ. (KEMP J., concurring).—The High Court has power to question the validity of the Legislative Acts of the Governor-General in Council.

Per MACPHERSON, J. (PONTIFEX J., concurring).—The High Court has no such power if satisfied that the Act is not within any of the prohibitions of the Indian Council's Act.

EMPRESS *v.* BURAH and BOOK SINGH 63

JURY, RIGHT TO A 20

See JURISDICTION OF CIVIL COURT.

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JURY, VERDICT OF ACQUITTAL BY 189

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 263.

KABULIAT—*Specific Performance of Conditions of—Specific Relief.*] One of the terms of a kabuliat, equally binding on the Government and a zemindar, the parties concerned, was as follows: "The construction of *bheries* (small embankments), the excavation of the silt of khals, the closing (the mouths) of the khals, the construction of *gangura* (large embankments), etc, in connection with the salt and sweet (*i e*, not saline) lands of the said pergunna, shall be made by the Government of the Honorable Company." In a suit brought by the zemindar to obtain an order upon the Government to re-excavate and clear the water-passage of a particular khal situate within the pergunna, the subject of the kabuliat, *held*, that the case was not one in which the Court would decree specific performance.

CHUNDER SEKHUR MOOKERJEE *v.* THE COLLECTOR OF MIDNAPORE 464

———, SUIT FOR—*Enhanced Rate—Peresumption of Landlord's willingness to grant potta.*] In order to entitle a landlord to sue a tenant for a kabuliat at a certain rate of rent, he should either have tendered a potta to the tenant at the rate of rent mentioned in the kabuliat, or he should be willing to grant a potta at the rate; and if the Court considers that the rent which he claims is the correct amount, it will presume that he is ready to grant a potta at that rate, and will give him a decree for the kabuliat.

But this presumption will not hold if the Court thinks that the rate claimed is too high; and in such a case, therefore the presumption having failed, the landlord will not be entitled to a kabuliat at such lower rate as the Court may think just, but his suit will be dismissed

GOGON MANJY *v* KASHISHWARY DEBY... 493

LAND HELD BY JOINT OWNERS—*Abatement of a Nuisance—Riot - Criminal Trespass—Mischief—Penal Code, ss. 141, 147, 425—Examination of Witness for Defence—Criminal Procedure Code (Act X of 1872), ss. 219, 359, 362—High Court, Extraordinary Jurisdiction—High Court Charter, cl. 15.*] *A*, a joint owner of a parcel of land, erected on it an edifice without the consent and against the will of *B*, another joint owner. A dispute having arisen in consequence, the Magistrate held an enquiry, and made an order under s. 530 of the Criminal Procedure Code, awarding to *A* exclusive possession of the part of the land on which the edifice had been erected. *Held per* JACKSON, J., that such order was erroneous, as the matter was not one to which s. 530 could apply.

B subsequently brought a suit in the Civil Court to establish his title to joint possession of the whole parcel and for a declaration that *A* was not entitled to erect any edifice thereon; and he further prayed that such edifice should be removed. *B* obtained a decree, whereupon his servants went on the land and pulled it down. They were charged before the Deputy Magistrate with having committed mischief, and on this convicted and fined. *Held per* JACKSON, J, that as there had been no causing of wrongful loss, the accused had not been guilty of mischief.

On the 8th October, the accused, who were the servants of *B*, found the men in the employ of *A* were putting up this erection, a *nawbat-khana*, again, and accordingly protested against its erection, pulled down the bamboos, thrust aside the servants of *A*, throwing

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to the ground one man who was clinging to the bamboos. On the 9th October 1877, these servants were charged before the Magistrate with rioting, and being called upon for their defence, named several witnesses, and summonses on the following morning were issued for their appearance, but they were not found. The accused then applied for further time for the appearance of the witnesses. This the Magistrate refused to grant, and convicted the accused on 12th October 1877. *Held per* JACKSON, J., that this being a warrant case it was the duty of the Magistrate to summon the witnesses that might be offered by the accused, and that he might at his discretion have adjourned the case.

Held further *per* JACKSON, J., that the meaning of s. 359 of the Criminal Procedure Code is, that, if, among the persons named by the accused as witnesses, the Magistrate considers that any witness is included for the purpose of vexation and delay, he is to exercise his judgment and enquire whether such witness is material; but that the section is not intended to enable the Magistrate to inquire into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence, he is absolutely to abstain from summoning the whole of the witnesses cited by the accused; and further, that in the present case there was not any purpose of vexation or delay, and that by the refusal to grant further time the accused had been probably prejudiced in their defence.

Held further *per* JACKSON, J., that, as the accused were not on the land in question as members of an unlawful assembly, nor for any unlawful purpose, the conviction, as well as the procedure, was illegal.

Held per CUNNINGHAM, J., that the accused were merely exercising the remedy of abating a private nuisance, and were exercising a legal right of self-defence.

Held further *per* CUNNINGHAM, J., that the acts of the complainants in erecting the *nawbut khana* amounted to mischief, and came within the purview of s. 425 of the Penal Code.

Held further *per* AINSLIE and McDONELL, JJ., that the High Court, in the exercise of its powers of extraordinary jurisdiction, cannot, in criminal matters, interfere, unless all other remedies provided by law have been previously exhausted. Therefore, where parties who had been convicted of riot by a Magistrate, and who having a right of appeal to the Sessions Court, instead of doing so, moved the High Court under cl. 15 of the Charter, the Court would not interfere until that remedy had been resorted to.

EMPRESS *v.* RAJCOOMAR SINGH 573

LANDLORD AND TENANT—*Erection of Buildings by Tenant-at-will or from year to year—Occupancy—Right of Landlord to determine Tenancy—Duty of Judges of Lower Courts.*] There is no law in this country which converts a holding at will from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, builds a dwelling-house upon the land demised.

The nature of a holding, as between landlord and tenant, must always be a matter of contract, either expressed or implied. If there is no express agreement, a tenant becomes a tenant-at-will, or from year to year, and is liable to be ejected upon a reasonable notice to quit unless some local custom to the contrary is proved.

PROSUNNO COOMAREE DEBEA *v.* SHEIKH RUTTON BEPARY ... 696

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LIEN BY CUSTOM 231
See INDIGO FACTORY.

——OF MORTGAGEE 363
See RES JUDICATA.

LIMITATION 6, 224, 331, 383, 547, 551, 716
See RES JUDICATA. TITLE. MAINTENANCE, SUIT FOR. RENT SUIT. EXECUTION OF DECREE. PARTITION, SUIT FOR. EXECUTION.

——*Arrears of Rent—Pendency of Enhancement Suit—Beng. Act VIII of 1869, s. 29.*] A sued for enhancement of rent of certain lands for a specified year. On the dismissal of this suit, *A*, more than five years after the rent fell due, sued for arrears of rent for the same year. *Held*, that *A* was not entitled to deduct the time occupied in the conduct of his enhancement suit from the period which elapsed since the rent first fell due in order to bring his case within the period of limitation prescribed for such last mentioned suits by s. 29 of Beng. Act VIII of 1869.
BROJENDRO COOMAR RAY *v.* RAKHAL CHUNDER RAY ... 791

——*Beng. Act VIII of 1869, s. 29.*] The ancestors of the plaintiff purchased certain property from Government in 1861, subject to an unexpired lease held by the defendants of the same property. On the expiry of the lease in 1866 the plaintiff endeavoured to obtain possession, but was opposed. He omitted to sue for possession till 1874, when the defendants set up certain chukdari tenures, and the Court found the defendants were entitled to the rights claimed; also finding that the plaintiff's suit was barred by limitation. Plaintiff thereupon, in 1876, brought a suit against the defendants for arrears of rent for the years 1866—72. *Held*, that, as the last rent thus claimed accrued due in 1872, plaintiff's right was barred by s. 29, Beng. Act VIII of 1869.
A plaintiff, who, through want of inquiry or mistake, brings a suit which he is unable to establish, will not be allowed, on discovering his error and bringing a suit in which he would have been entitled to recover had he brought it within time, to take advantage of his own mistake to relieve himself from the law of limitation.
HURRO PROSHAD ROY *v.* GOPAUL DASS DUTT 817

——*Execution of Decree—Application for—Limitation Act (IX of 1871), sched. ii., art. 167—Act VIII of 1859, s. 214.*] On the presentation of the last of a series of applications made for the execution of a decree, the Court is competent to consider the question whether, on the date of making a prior application for execution, the decree sought to be enforced was barred by limitation, and that notwithstanding the fact that notice of such prior application had been served on the judgment-debtor under s. 216 of Act VIII of 1859.
The time prescribed by the Limitation Act (IX of 1871) within which applications for execution may be made, govern all such applications made during the time that Act was in force.
UNNODA PERSAD ROY *v.* SHEIKH KOORPAN ALLY ... 518

——*Grant in lieu of Maintenance—Right to resume.*] Although a grant of a mokurrari lease in lieu of maintenance may be resumable by the grantor and his heirs, yet, if the grantor or any of his successors receives distinct notice of a claim on the part of the grantee to hold in perpetuity and not subject to resumption,

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and allows twelve years to go by without contesting such claims, he (such grantor or successor) will be barred for the time of his own enjoyment.

PETAMBAR BABOO *v* NILMONY SINGH DEO 793

LIMITATION—*Oral Agreement—Debt payable by Instalments—Act XV of 1877, sched. ii, art. 75.*] *A* entered into a verbal agreement with *B* to pay a debt due in monthly instalments, *B* reserving to himself the right to claim payment of the whole sum due on default of three successive instalments *A* failed to pay any instalment. Four years after the first instalment was due, *B* sued *A* to recover the sum due on the various instalments not barred by limitation. *Held*, that *B* was not bound to sue for the whole amount due directly on *A's* failure to pay the three successive instalments.

Semble.—Art. 75, sched. ii of Act XV of 1877, does not apply according to its strict terms to a suit brought upon a verbal contract.

KOYLASH CHUNDER DASS *v.* BOYKOONTO NATH CHUNDRA ... 619

———*Possession—Acts of Ownership—Evidence of Possession—Grant of Potta*] Where land, the right to which is disputed, has been uninhabited and uncultivated, and no acts of ownership by any person can be proved to have been exercised over it, it is often necessary, for the purpose of deciding the question of limitation, to rely upon slight evidence of possession, and sometimes possession of the adjoining land, coupled with evidence of title, such as grants of leases, and the Courts are justified in presuming, under such circumstances, that the party who has the title has also the possession.

But where the land has been occupied, it is generally proper, for purposes of limitation, to deal with the question of possession as distinct from the question of title, for while the title may be in one person, a twelve years' possession may have barred that title.

MOHIMA CHUNDER DEY SIRCAR *v.* HURRO LALL SIRCAR ... 768

———ACT (XIV OF 1859), ss. 20, 21—*Execution of Decree—Interpretation of Statutes—Res Judicata—Act VIII of 1859, s. 2.*] A decree was obtained in the Court of the Deputy Commissioner of Delhi on the 5th October 1866, prior to the date when Act XIV of 1859 was extended to the Punjab, *viz.*, the 1st of January 1867. On the 22nd of October 1869 an application, admittedly *bonâ fide*, was made for execution, but the application was refused on the ground that it was barred by lapse of time, and no appeal was brought against that order A subsequent application for execution was made on the 4th of May 1871, which was also refused on a similar ground. On appeal the Commissioner and Chief Court confirmed this order. *Held*, reversing the decision of the Court below, that execution of the decree was not barred by s. 21, Act XIV of 1859.

In interpreting Statutes, the words 'must' and 'shall' may, in some cases, be substituted for the word 'may' but only for the purpose of giving effect to the intention of the Legislature. In the absence of proof of such intention, the word 'may' should be taken as used in its natural,—*i e.*, in a permissive, and not in an obligatory, sense.

In construing s. 21, Act XIV of 1859, the words "nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act," mean that nothing in the preceding section should prejudicially affect the right of a creditor under a

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judgment in force at the time of the passing of the Act: and the words "but process of execution may be issued, &c.," mean that notwithstanding anything in the preceding section, execution might issue either within the time limited by the law in force when the Act was passed, or within three years next after the passing of the Act, whichever should first expire.

An order passed by a Court rejecting a *bonâ fide* application by a judgment-creditor for the execution of his decree on the ground that the period allowed by law for execution has expired, *held* not to be an adjudication within the rule of *res judicata*, or within s. 2, Act VIII of 1859.

THE DELHI AND LONDON BANK, LIMITED *v.* ORCHARD ... 47

LIMITATION ACT (IX OF 1871), SCHED. II, ARTS. 11, 118—*Exclusive Privilege—Account of Profits—Damages—Act XV of 1859, s. 22.*] In a suit for an account of profits obtained by the infringement of an exclusive privilege, the period of limitation, the taking of an account being only a mode of ascertaining the amount of damages, is the same as the period of limitation for an action for damages on the same ground, *viz.*, the period prescribed by art 11, sched. ii, Act IX of 1871.

KINMOND *v.* JACKSON 17

——————————, ARTS. 127, 143 ... 228

See PRACTICE.

——————————, S. 27, SCHED. II, ART. 145 276

See JALKAR.

——————————, SCHED. II, ART. 167—"*Applying to enforce the Decree*"—*Application "to keep the Decree in force"—Act VIII of 1859, s. 212.*] The words "applying to enforce the decree," in Act IX of 1871, sched. ii, art. 167, mean the application (under s. 212, Act VIII of 1859, or otherwise) by which proceedings in execution are commenced, and not applications of an incidental kind made during the pendency of such proceedings.

In cases governed by Act IX of 1871, a decree-holder who has applied to the Court *simpliciter* "to keep the decree in force," may, within three years from the date of such last named application, obtain execution of his decree.

CHUNDER COOMAR ROY *v.* BHOGOBUTTY PROSONNO ROY ... 235

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See LIMITATION.

LOPEZ'S CASE, DOCTRINE IN 796

See DILUVIATED LANDS.

MAHOMEDAN FAMILY ADOPTING HINDU CUSTOMS—*Law applicable to—Discretion of Judge.*] A Mahomedan family may adopt the customs of Hindus subject to any modification of those customs which the members may consider desirable. A Judge is not bound, as a matter of law, to apply to a Mahomedan family living jointly all the rules and presumptions which have been held by the High Court to apply to a joint Hindu family. It rests with him to decide in any particular case how far he should apply those rules and presumptions.

SUDDURTONNESSA *v.* MAJADA KHATOON 694

——————LAW—*Widow's Rights—Return.*] By the Mahomedan law of inheritance, in default of other sharers and in the

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absence of distant kindred, the widow is entitled to the 'return,' to the exclusion of the fisc.
MAHOMED ARSHAD CHOWDHRY *v.* SAJIDA BANOO ... 702

MAINTENANCE 214
See MITAKSHARA.

——————OF BUNDS—*Prescriptive Right—Escape of Water—Injury to Neighbouring Properties—Vis Major.*] Where a defendant shows a prescriptive right to maintain a bund, and uses all reasonable and proper precautions for its safety, he cannot be made liable for damage caused by the escape or overflow of water on to the lands of others and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major.*
RAM LALL SINGH *v.* LILL DHARY MUHTON 776

——————, SUIT FOR—*Limitation—Act XIV of 1859, s. 1, cl. 13—Act IX of 1871, sched. ii, art. 128.*] A claim once barred cannot be revived by a change in the law of limitation. This principle applies as well to a claim for arrears of maintenance or any other claims, as to one for possession of land.
KRISHNA MOHUN BOSE *v.* OKHILMONI DOSSEE 331

MALIKANA RIGHTS 414
See ATTACHMENT OF MALIKANA RIGHTS IN EXECUTION OF A DECREE.

MANAGEMENT OF A RELIGIOUS ENDOWMENT, SUIT FOR—*Advocate-General a party to such Suits—Ambiguous Description of Plaintiff—Jain Sect—Hindu Law—Sebait—Jurisdiction of High Court—Religious Endowments—Act XX of 1863.*] The plaintiffs, describing themselves as the Calcutta Tairo Pantee Anungo Punch Brethren, in whom (as they alleged) was vested the management and control of the temples, endowments, and worship of the Degumbory Sect of Jains, and who formed the Committee for the management of all the Jain charities as well in Calcutta as in all the other towns and places in India, brought a suit praying, *inter alia*, for the construction of a wall, and for a declaration of their rights thereunder as members of the said Punch, and to have property dedicated by the will to religious purposes ascertained and secured. *Held per* KENNEDY, J., in the Court below, that the description of the character in which the plaintiffs sued was uncertain and ambiguous; that, inasmuch as the property in question was not *dewutter*, the plaintiffs were not sebaits, and all they could claim, therefore, was a right of management; and that a mere manager, without some special power which the Hindu law confers on sebaits, could not institute such a suit; that the plaintiffs not being a corporation could not sue in a corporate character; that, assuming religious endowments had been created by the will, leave to bring the suit should have been obtained under s. 18 of Act XX of 1863; and that, if the gifts in the will could be treated as charitable bequest, possibly the Advocate-General could sue. *Held*, on appeal, reversing the decision of the lower Court, that the right in which the plaintiffs sued was sufficiently shown, and that the object of the suit was not to assert any personal right of ownership in the plaintiffs. *Held*, further, that the Advocate-General was not a necessary party, although it was desirable that such suits should be brought only with his consent, or by the leave of the Court. *Held*, further, that suits of this

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description do not fall under Act XX of 1863. but come under the ordinary jurisdiction of the Court, inherited from the Supreme Court, and conferred upon that Court by its Charter—a jurisdiction similar in its general features to that of the Lord Chancellor in England.

PANCHCOWRIE MULL v. CHUMROOLAL 563

MANAGER, APPOINTMENT OF 335
See MORTGAGE DECREE.

MATERIAL IRREGULARITY 544
See SALE IN EXECUTION OF DECREE.

MERGER 307
See MORTGAGE, EFFECT OF SUBSEQUENT MORTGAGE.

MESNE PROFITS 720
See PRACTICE.

MISTAKE OF FACT AND OF LAW 602
See INTEREST ON DECREES.

MITAKSHARA 1, 198
See HINDU LAW.

———*Alienation of Ancestral Property—Illegitimate Son—Maintenance.*] Since by the Hindu law the illegitimate son of a person belonging to one of the "twice-born" classes is entitled to maintenance, an assignment to him by his father, having no legitimate son then born, of a part of his ancestral estate, being in performance, of a legal obligation, is on a different footing from a voluntary alienation to a stranger, and is valid under the law of the Mitakshara.

Quære.—Whether under the Mitakshara law a father who has no child born to him is competent, without legal necessity, to alienate the whole or any part of the ancestral estate; or whether the rights of unborn children are so preserved as to render such an alienation unlawful?

PARICHAT *v.* ZALIM SINGH 214

MITAKSHARA LAW—*Ancestral Property—Foreclosure—Alienation.*] Until foreclosure, the vendee under a bond of conditional sale holds the lands, the subject of the bond, as security for the only money lent.

Semble.—The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immoveable property of the person who advanced the money.

Quære.—Whether ancestral property which was moveable when it descended, but has been converted into immoveable property, is not immoveable ancestral property for the purposes of the Mitakshara law?

SHAM NARAIN SINGH *v.* RUGHOOBURDYAL 508

MODIFICATION OF EXECUTION ORDER BY COURT ... 514
See PARTITION OF A POOJAH DALAN, EXECUTION OF DECREE FOR.

MONEY PAID UNDER PROCESS OF DECREE, SUIT TO RECOVER—*Decree superseded—Review—Act XXIII of 1861, s. II.*] In a suit by the present defendant against the present plaintiff for enhancement of rent, the Court of first istance and the High Court

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made decrees for enhanced rent. The Privy Council, in the year 1873, reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered and the fixed rent which he was bound to pay. *Held* by MACPHERSON, MARKBY, and AINSLIE, JJ., following *Shama Purshad Roy Chowdhry* v. *Hurro Purshad Roy Chowdhry*, that the decrees for enhanced rent were superseded, and that such a suit as the present one would lie. *Held* by GARTH, C. J., and JACKSON, J., distinguishing *Shama Purshad's* case, that these decrees were not superseded; that the principle of *Marriot* v. *Hampton* applied, and that the plaintiff was not entitled to recover.

JOGESH CHUNDER DUTT *v.* KALI CHURN DUTT ... 90

MORTGAGE 231

See INDIGO FACTORIES.

——————*Covenant not to Alienate.*] An agreement recited that *A* had executed a bond in favour of *B*, in which it was declared, "I promise to repay the whole principal, with interest, in the month of Phalgun, 1271, F.S., and till payment of the amount I will not transfer any property by conditional sale or mortgage." The bond contained no further proviso declaring invalid future alienations of the lands belonging to *A*, in the manner specified in the bond. *Held*, that the instrument did not operate as a mortgage by *A*.

GUNOO SINGH *v.* LATAFUT HOSSAIN 336

——————*Foreclosure—Notification—Reg. XVII of 1806, s. 8.*] The condition of foreclosure required by s. 8, Reg. XVII of 1806, is that the mortgagor should be furnished with a copy of the petition referred to in the section, and should have a notification from the Judge in order that he may, within a year from the time of such notice, redeem the property.

In an action brought to recover possession as upon a foreclosure, it is essential for the plaintiff to satisfy the Court that the above condition has been complied with.

In such a case, the service of the notice must be established by evidence. The mere return of the Nazir on the back of the Judge's perwannah to the effect that the mortgagor had been duly served, is not legal evidence of service.

The functions of the Judge under s. 8 are merely ministerial.

The year during which the mortgagor may redeem runs not from the date of the perwannah, or the issuing of it by the Judge, but from the time of service.

Where there are several mortgagors, and it is not sought to foreclose the individual shares of each as against each, but to foreclose the whole estate as upon one mortgage, one debt, and one entire right against all, service of the notice upon some only of the mortgagors is insufficient to warrant the foreclosure of the whole estate or of any part of it.

Quære.—Whether there may not be cases of mortgages of separate shares, in which by proceedings properly framed foreclosure may take place in respect of some of such shares only?

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The mortgagee, when he seeks to foreclose, must discover and serve notice on those who are the then owners of the estate.

NORENDER NARAIN SINGH *v.* DWARKALAL MUNDUR ... 397

MORTGAGE BOND, SIMPLE 363
See RES JUDICATA.

——— DECREE—*Appointment of Manager—Execution Sale—Act VIII of 1859, s. 243.*] Section 243, Act VIII of 1859, does not apply to a decree on a mortgage, when the decree declares that certain property is to be sold in satisfaction of the mortgage debt. A manager therefore cannot be appointed under s. 243 in such a case.

WOMDA KHANUM *v.* RAJROOP KOAR 335

———, EFFECT OF SUBSEQUENT MORTGAGE—*Extinguishment—Merger.*] A creditor holding a mortgage on the lands of his debtor does not necessarily surrender that mortgage, or lower its priority, by taking a subsequent mortgage, including the same lands with other lands, for the same debt. Whether the earlier mortgage becomes merged and extinguished or not is a question of intention.

GOLUKNATH MISSER *v.* LALLA PREM LAL 307

MORTGAGEE'S LIEN 363
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MORTGAGOR'S RIGHT, TITLE, AND INTEREST 363
See RES JUDICATA.

MOTHER, SHARE OF, ON PARTITION AMONG SONS ... 149
See HINDU LAW.

MUNICIPAL COMMISSIONERS—*Public Servant—Act IV of 1877 (Presidency Magistrates' Act), ss. 39, 240—Indian Penal Code, ss. 11, 21, Descrip. 10, Illus. 1.*] A Municipal Corporation is not a public servant within the meaning of s. 39 of Act IV of 1877, and may, therefore, be prosecuted under the Penal Code without the preliminary sanction of the Government required by that section.

EMPRESS *v.* THE MUNICIPAL CORPORATION OF THE TOWN OF CALCUTTA 758

NON-JOINDER OF PARTIES 26
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NOTICE OF DISHONOUR 339
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——— UNDER ACT VIII of 1862 (B.C.), s. 14 271
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——— TENURE CANNOT BE SUB-DIVIDED WITHOUT CONSENT OF THE ZEMINDAR 774

OFFENCE PUNISHABLE BY FINE AND CONFISCATION—*Act XXI of 1856, s. 49—Offences triable in a summary way—Summons Cases—Sentence—Criminal Procedure Code (Act X of 1872), ss. 4, 8, 148, 149, & 222.*] An offence under s. 49 of Act XXI of 1856 can be tried summarily under s. 222 of the Criminal Procedure Code, the confiscation provided by s. 49 being merely a consequence of the conviction, and not forming part of the punishment for the offence.
EMPRESS *v.* BAIDANATH DASS 366

OFFENCES TRIABLE IN A SUMMARY WAY 366
See OFFENCE PUNISHABLE BY FINE AND CONFISCATION.

ONUS OF PROOF 509
See EVIDENCE ACT.

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ORDER APPEALABLE 579
See GOVERNMENT CURRENCY NOTE, THEFT OF.

OUDH ESTATES ACT (I OF 1869), s. 3—*Registered Talukdar—Beneficial Interests—Act II of 1863, s. 1—Privy Council—Admission of Appeals to.*] An Oudh taluk standing in the name of *J. S.* as kabuliatdar, having been confiscated under Lord Canning's proclamation of March 1858, was summarily settled with *J. S.* on the 24th April following. A talukdary sanad was granted to *J. S.*, and he was subsequently registered as talukdar under the provisions of Act I of 1869.

In a suit against *J. S.* by persons alleging themselves to be joint in family and estate with him, to have their interest in the taluk declared, held by the Commissioner of Seetapore in Oudh, confirming the decision of the Settlement Officer, that, under Act I of 1869, the defendant was protected by his sanad against any claim of the plaintiffs in respect of the taluk. *Held* by the Privy Council on appeal, that, as a person who has been registered as a talukdar under Act I of 1869, and has thereby acquired a talukdary right in the whole property, may, nevertheless, have made himself a trustee of a portion of the beneficial interest in lands comprised within the taluk for another, and be liable to account accordingly, the suit must be remanded for trial as to whether the defendant had agreed, or become bound, to hold the villages comprised in the summary settlement and sanad, or, the rents, and profits thereof, in trust for the plaintiffs.

The words "Court of highest civil jurisdiction in any Province" in Act II of 1863 have reference to the general jurisdiction of the Courts, and not to the finality of their decisions in particular cases. A Court which, under the provisions of Act XXXIII of 1871, is a subordinate Court, has no authority, under Act II of 1863, to admit an appeal to Her Majesty in Council even where its decision is final.
HARDEO BUX *v.* JAWAHIR SINGH 527

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PARTIES, NON-JOINDER OF 26
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PARTITION 149
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——AMONG SONS—*Mother, share of* 149
See HINDU LAW.

——OF A POOJAH DALAN, EXECUTION OF DECREE FOR—*Coparceners, Consent of—Modification of Execution Order by Court.*] A decree directed partition of a family dwelling-house with its appurtenances, including a poojah dalan and courtyard adjoining it. In execution of that decree, the Civil Court Ameen, at the request and with the consent of two out of three coparceners, did not partition the poojah dalan and courtyard. To this the third coparcener objected, but her objection was overruled by the lower Courts, and it was directed that the property in question should remain undivided. *Held*, that the Court would be disinclined to order the property to be divided without giving the coparcener or coparceners who might wish to keep it entire an opportunity of doing so.

Held per WHITE, J., that having regard to the form of the decree, it was not open to the Court executing it to order that any part of the property should remain joint, except with the consent of all the coparceners who were parties to the suit.

Semble per MITTER, J., that the lower Courts were not precluded by the decree from dealing with the property in the mode in which they had done.

RAJOOOMAREE DASSEE *v.* GOPAL CHUNDER BOSE ... 514

——SUIT, RIGHT OF DEFENDANT IN, TO ENFORCE DECREE 551
See PARTITION, SUIT FOR.

——, SUIT FOR—*Execution—Limitation—Partition Suit, Right of Defendant in, to enforce Decree.*] A decree for partition is not like a decree for money or the delivery of specific property which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each shareholder or set of shareholders having a distinct share.

A, on the 29th June 1871, obtained a decree for partition against *B*, his co-shareholder, and, on the 28th November 1876, applied to have the execution proceedings struck off the file. The application was refused, and the partition was ordered to be completed at *B's* expense. *Held*, that as the execution proceedings taken either by one shareholder or the other were taken on behalf of both, limitation did not apply.

SHEIKH KHOORSHED HOSSEN *v.* NUBBEE FATIMA ... 551

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See RES JUDICATA.

PENAL CODE, ss. 21 AND 109 497
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————, s. 217—*Public Servant, Offence by, punishable under s. 217 of Penal Code.*] It is sufficient for the purpose of a conviction under s. 217 of the Penal Code, that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done this with the intention of saving a person from legal punishment; it is not necessary to show that in point of fact the person so intended to be saved had committed an offence or was justly liable to legal punishment.
EMPRESS *v.* AMIRUDDEEN 412

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See LIMITATION.

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POLICY OF ASSURANCE 347
See STAMP ACT (XVIII OF 1869), ss. 34 AND 41.

POSSESSION 768
See LIMITATION.

————, SUIT FOR—*Fraud—Limitation Act (IX of 1871), sched. ii, art 95—Sale for Arrears of Government Revenue.*] Art. 95 of second schedule to Act IX of 1871 was not intended to apply to suits for possession of immoveable property when fraud is merely a part of the machinery by which the defendant has kept the plaintiff out of possession. That article has reference to cases where a party has been fraudulently induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act.
CHUNDER NATH CHOWDHRY *v.* TIRTHANUND THAKOOR ... 504

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————*Appeals to High Court—"Decree"—"Judicial Proceedings"—"Procedure"—Saving of Right of Appeal—Act XXIII of 1861—General Clauses Act (I of 1868), s. 6—Act VI of 1871—Act VIII of 1859—Act X of 1877, ss. 3, 540, 588, 591, 647—24 and 25 Vict., c. 104, s 9—Letters Patent, 1865, cl. 16.*] In all suits instituted before Act X of 1877 came into force, in which an appeal lay to the High Court under Act VIII of 1859, an appeal still lies notwithstanding the repeal of that Act by Act X of 1877.

Per GARTH, C. J.—A suit is a "judicial proceeding," and the words "any proceedings" in s. 6 of Act I of 1868 include all proceedings in any suit from the date of its institution to its final disposal, and therefore include proceedings in appeal. The word "procedure" in s. 3, Act X of 1877, has not the same meaning as the word "proceedings" in the above-mentioned section.

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The proceedings in a suit instituted before Act X of 1877 came into force, including a special appeal if the old Code allowed one, go on to the end of the suit notwithstanding the repeal of the old Code. The "procedure," that is to say, the machinery by which those proceedings are conducted, is after decree, to be that provided by the new Code.

Per JACKSON, J.—The word "decree," as defined in Act X of 1877, does not include "orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree.

The power of the High Court to hear appeals from the Civil Courts in the interior is regulated by Act VI of 1871.

Section 6 of Act I of 1868 covers proceedings taken in execution of decree which have been commenced before Act X of 1877 came into force.

Per MARKBY, MITTER, and AINSLIE, JJ.—Clause 16 of the Letters Patent of 1865 empowers the High Court to hear appeals in all cases in which an appeal lay under Act VIII of 1859.

RUNJIT SINGH *v.* MAHERDAN KOER 662

PRACTICE—*Execution of Decree—Mesne Profits—Act XXIII of 1861, s. 11.*] *A* sued *B* and obtained possession of certain property under a decree. On appeal this decree was reversed. The judgment and decree of the Appellate Court made no order about mesne profits which had accrued during the time the land was in possession of *A*. *B* thereupon, seeking execution of the Appellate Court's decree, applied to be reinstated in possession, and also for an order awarding her mesne profits for the time during which she was out of possession of the said lands. *Held*, that upon such application, it was competent for the Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived of by such enforcement.

LATI KOOER *v.* SOBADRA KOOER 720

———*Immoveable Property situate in different Districts—Leave to admit Plaint—Civil Procedure Code (Act X of 1877), ss. 2, 19—Charter Act, cl. 12.*] Under s. 19 of the Civil Procedure Code, it is not necessary to obtain the leave of the Court to sue in respect of immoveable property situate partly within and partly without the ordinary original civil jurisdiction of the High Court.

NARAIN SINGH *v.* RAM LALL MOOKERJEE 370

———*Joinder, Drawer and Acceptor of a Bill, Suit against—Act X of 1877, s. 29.*] The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills.

PESTONJEE EDULJEE GURDUR *v.* MIRZA MAHOMED ALI ... 541

———*Right of Appellant (Respondent in Lower Appellate Court) to prefer Appeal—Act VIII of 1859, s. 119—Suit by Hindu excluded from Joint Family Property—Limitation Act (IX of 1871), sched. ii, arts, 127, 143.*] An appellant, who was respondent in a lower Court of appeal, is not precluded, by reason of his non-appearance in such Court, from preferring an appeal to the High Court.

In a suit by a Hindu excluded from joint family property, to enforce a right to a share therein, brought before the 1st of October 1877, the period of limitation must be computed under art. 127 and not under art. 143 of sched. ii of Act IX of 1871.

KALI KISHORE ROY *v.* DHUNUNJOY ROY 228

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PRACTICE—*Summary Suit on Promissory Note—Time extended for Defendant to appear and defend Suit—Act X of 1877, Chap. XXXIX.*] The High Court has power to extend the time within which a defendant, in a suit brought under Chap. xxxix (summary procedure on negotiable instruments) of the Civil Procedure Code, can come in and obtain leave to defend: therefore, in a suit in which it appeared that the defendant resided at Peshawar, the time for the defendant to obtain leave from the Court to appear and defend was extended to twenty-eight days.
GROOM *v.* WILSON 539

———*Summons to the Defendant to appear and answer—Fresh Summons—Rules of the High Court (4th December 1875) 1 and (9th February 1875)—8—Limitation.*] A plaint was filed on 12th March 1875, and the summons to the defendant to appear and answer issued on 13th March 1875. With the exception of an application for substituted service made on 20th March 1875, and which was refused, no further steps were taken in the matter until 21st March 1878, when the plaintiff applied for a fresh summons to issue, the time for the return of the first summons having long since expired. *Held*, that the mere filing of a plaint, or the naked fact that a plaint is on the file, will not of itself prevent the operation of the law of limitation, and that as no steps had been taken to renew the summons for three years, and as no sufficient case to excuse the delay had been made out, the application was out of time, and should be refused.
RAMKISSEN DOSS *v* LUCKEYNARAIN 312

PRESUMPTION AS TO JOINT ESTATE 615
See HINDU LAW.

———OF LANDLORD'S WILLINGNESS TO GRANT POTTA 498
See KABULIAT, SUIT FOR.

PRINCIPAL AND SURETY—*Accommodation Acceptor—Discharge of Surety—Equitable Mortgage—Trust Deed for benefit of Creditors—Eventual Remedy of Surety—Contract Act (IX of 1872), ss. 132, 134, 135, & 139—Evidence Act (I of 1872). s. 92.*] In the years 1870 and 1873 *A* drew certain bills of exchange upon *B*, which were accepted by *B* for the accommodation of *A*, and endorsed by *A* to the Bank of Bengal. In May 1876 *A*, by letter, agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to *B*; and in the meantime to hold such property at the disposal of *B*, his successors and assigns. In the month of June 1876, A became unable to meet his liabilities, and in the month of August following executed a conveyance of all his property to the Official Trustee upon trust for the benefit of *A's* creditors. The Bank assented to and executed this deed after it had been assented to and executed by some of the other creditors. The deed did not contain any composition with or release by the creditors, nor any covenant on their part not to sue *A*. In a suit by the Bank against *B*, as acceptor of the bills—

Held, that *B* was not precluded by the provisions of s. 132 of the Contract Act and s. 92 of the Evidence Act from pleading that he was an accommodation acceptor only; but

Held, that the letter of May 1876 constituted a good equitable mortgage, and that *B* was not thereafter entitled, as against the Bank, to the equitable rights of an accommodation acceptor.

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Held further, that the trust deed did not impair the "eventual remedy" of B, and that therefore he was not discharged from his suretyship under the provisions of s. 139 of the Contract Act.
POGOSE *v.* BANK OF BENGAL 174

PRIVILEGED COMMUNICATION 742
See REPORT BY MAGISTRATE.

PRIVY COUNCIL, ADMISSION OF APPEALS TO 522
See OUDH ESTATES ACT (I OF 1869), s. 3.

———————ORDER AWARDING COSTS 161
See EXECUTION.

PROBATE—*Ad valorem Fee—Annuity charged upon Property of Testator—Court Fees Act (VII of 1870), sched. i, cl. 11.*] Where it appeared that property disposed of by a will was bequeathed to the testatrix subject to the payment thereout of an annuity for life to a person who survived her,—*held*, that the *ad valorem* fee prescribed by sched. i, cl. 11, of the Court Fees Act ought to be levied upon the value of the property, less the capitalized value of the annuity.
IN THE GOODS OF RUSHTON 736

———, DUTY PAYABLE ON SECOND GRANT OF ... 733
See AD VALOREM DUTY.

PROCEDURE—*Magistrate authorized to prosecute.*] A Magistrate, who has been authorized by the Collector of a district under s. 43 of the Stamp Act, to prosecute offenders against the stamp laws, is not competent also to try persons whom he prosecutes. The Collector should appoint some person other than a Magistrate to conduct the prosecutions.
EMPRESS *v.* GANGADHAR BHANJO 622

PROCLAMATION 542, 544
See SALE IN EXECUTION OF DECREE.

PROFITS, ACCOUNT OF 17
See LIMITATION ACT (IX OF 1871), SCHED II, ARTS. 11 118.

PROMISSORY NOTE—*Unstamped Document—Admissibility of Evidence aliunde.*] The plaintiff, in a suit on a promissory note written on unstamped paper, is not debarred from giving independent evidence of consideration.
GOLAP CHAND MARWARRE *v.* THAKURANI MOHOKOOM KOOARRE 314

———————,SUMMARY SUIT ON 539
See PRACTICE.

PROSECUTE.] Magistrate authorized to prosecute is not competent to try 622
See PROCEDURE.

PUBLIC SERVANT—*Penal Code, ss. 21 and 109.*] A person appointed by the Government Solicitor with the approval of Government and under an arrangement by the Governor-General in Council to act as prosecutor in the Calcutta Police Courts, is a public servant within the meaning of s. 21 of the Indian Penal Code.
EMPRESS *v.* BUTTO KRISTO DOSS 497

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PUBLIC SERVANT, OFFENCE BY, PUNISHABLE UNDER s. 217 OF THE PENAL CODE 412
See PENAL CODE, s. 217.

———THOROUGHFARE, ENCROACHMENT ON ... 20
See JURISDICTION OF CIVIL COURT.

PURDAH WOMAN—*Execution of Documents.*] A Court, when dealing with the disposition of her property by a *purdah* woman, ought to be satisfied that the transaction was explained to her, and that she knew what she was doing; especially in a case where, without legal assistance, for no consideration, and without any equivalent, she has executed a document, written in a language she does not understand, which deprives her of all her property. In the case of a *purdahnashin* woman, who has no legal assistance, the ordinary presumtion, that if a person of competent capacity signs a deed he understands the instrument to which he has fixed his name, does not arise.
The decision of the High Court that the endowment created by the document was not of such a public character as would sustain a suit under Act XX of 1863, not dissented from.
ASHGAR ALI *v.* DELROOS BANOO BEGUM 324

RATIFICATION—*Company—Acts done by Directors in excess of authority.*] The ratification by a company of particular acts done by its directors in excess of the authority given them by the articles of the company, does not extend the powers of the directors so as to give validity to acts of a similar character done subsequently.
IRVINE *v.* THE UNION BANK OF AUSTRALIA 280

REBUTTAL OF PRESUMPTION 688
See DIVORCE ACT (IV OF 1869).

RECOGNIZANCE—*Power of High Court to interfere when forfeited.*] The High Court has no power to reduce the amount of recognizances which have been forfeited, but in a case of hardship the matter should be referred to Government.
EMPRESS *v.* NURAL HUQQ 757

RECORD.] Putting a person on the—who is not legal representative of a deceased party to the suit 708
See CHARTER ACT (24 AND 25 VICT., c. 104), s. 15.

REFERENCE TO FULL BENCH 20
See JURISDICTION OF CIVIL COURT.

REFUSAL TO GIVE RECEIPT FOR SUMMONS—*Indian Penal Code (Act XLV of 1860), s. 173.*] A refusal to give a receipt for a summons is not an offence under s. 173 of the Indian Penal Code.
IN RE BHOOBUNESHWAR DUTT 621

REGISTERED TALUKDAR 522
See OUDH ESTATES ACT (I OF 1869), s. 3

REGISTRATION ACT (XX OF 1866), ss. 52, 53 517
See APPEAL, RIGHT OF.

———SUMMARY PROCEDURE UNDER ... 363
See RES JUDICATA.

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REGISTRATION—*Dowl Fehrist—Act VII of 1871.*] A *dowl fehrist* being merely a memorandum by a zemindar's agent of the rates of rent agreed upon, and to which the tenants affix their signatures in token of such agreement, is not a contract, and does not require to be stamped or registered.
GUNGAPERSAD *v.* GOGUN SING 322

——————OF TRANSFER 392
See BANK OF BENGAL ACT.

——————*Right to Appeal—Act VIII of 1871, s. 76—General Clauses Act (I of 1868), s. 6*] An order refusing registration of a deed was passed on 23rd August 1872; and when Act VIII of 1871 was in force, an application for review was presented and finally rejected on 20th December 1877 after the repeal of Act VIII of 1871 by Act III of 1877. *Held* that, under the provisions of s. 6 of Act I of 1868 (the General Clauses Act), the proceedings must be governed by the Act in force at the time when they were instituted,—namely, by Act VIII of 1871, and therefore no appeal would lie.
SYED MAHOMET HOSSEIN *v.* HADZI ABDULLAH ... 727

REGULATION VIII OF 1793, s. 51, CL. 1 251
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REMEDY OF SURETY 174
See PRINCIPAL AND SURETY.

RENT, ENHANCEMENT OF 251
See GHATWALI TENURE.

——SUIT—*Decree obtained ex parte - Limitation—Time expired Decree—Admissibility of, as Evidence.*] A decree obtained *ex parte* is, in the absence of fraud or irregularity, as binding for all purposes as a decree in a contested suit.
Such a decree is admissible as evidence even though the period for executing it has expired.
Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for the previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, which had been obtained *ex parte*, as evidence of the rent due to him from the defendant,—*Held* (following *Nobo Doorga Dossee* v. *Foyz Buksh Chowdhry*), that the decree in the first suit determined the amount of rent due from the defendant to the plaintiff. *Held* further, that the decree was properly admissible as evidence though the plaintiff had not taken out execution upon that decree and his right to take out execution was barred by limitation.
BIRCHUNDER MANICKYA *v.* HURRISH CHUNDER DASS ... 383

RENT, SUIT FOR 145, 789
See RES JUDICATA.

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RENT SUIT UNDER Rs. 100 151
See JURISDICTION.

REPORT BY MAGISTRATE—*Privileged Communication—Judicial Proceeding.*] Where the Magistrate of a division held an inquiry, under s. 135 of the Criminal Procedure Code, into the cause of the death of a person found dead under suspicious circumstances, and, without making a specific charge against any person, drew up a report embodying the result of his inquiry, and sent the report to the Magistrate of the district, and subsequently proceedings were taken against one of the witnesses, which ultimately resulted in an acquittal, *held* by the High Court, that there being nothing in the language of s. 135 requiring the Magistrate holding such an inquiry either to make a report or to come to a finding, the report actually sent could not be considered as part of a judicial proceeding, and that therefore the High Court had no power to send for it under s. 296 of the Criminal Procedure Code.

No analogy exists between a Coroner's Inquest and an inquiry into the cause of death under the Criminal Procedure Code.

IN THE MATTER OF TROYLOKHANATH BISWAS 742

RES JUDICATA 47, 271, 353
See LIMITATION ACT (XIV OF 1859), ss. 20, 21. ENHANCEMENT OF RENT, JOINT CONTRACTORS, SUIT AGAINST.

————————.] *A* sued *B* to establish his rights of possession to certain lands allotted him under a butwara made in accordance with the provisions of Reg. XIX of 1806. In a previous suit by *B* instituted after the butwara against a tenant for arrears of rent due for a portion of the lands now in dispute. *A* intervened and was made a defendant on the sole ground that he was the person entitled to the rent, but failed to establish his claim.

Held, following the Full Bench case of *Gobind Chunder Koondoo* v. *Taruck Chunder Bose*, that *A's* present suit was barred by the judgment in the former suit.

BEMOLASOONDURY CHOWDHRAIN *v.* PUNCHANUN CHOWDHRY... 705

————————*Act VIII of 1859, s. 2—Suit for specific sum of Money.*] In a suit for a specific sum of money, it was *held*, in accordance with the Full Bench decision in *Dinobundhoo Chowdry* v. *Kristomonee Dossee*, that the plaintiff was bound to put forward every right under which he claims.

BHEEKALALL *v.* RHUGGOO LALL 23

————————————————*Suit for Rent.*] The plaintiffs brought this suit to establish, as against the defendants, their title to certain land in the occupation of a tenant. In a previous suit instituted by one of the present defendants against the tenant for rent, one of the present plaintiffs (representing the right now claimed by all of them) intervened as a defendant, on the ground that he was the person entitled to the rent, and failed to establish his claim.

Held, following the Full Bench case of *Hurri Sunkur Mookerjee* v. *Muktaram Patro*, that the plaintiffs in this suit were barred by the judgment in the former suit.

When once it is made clear that the self-same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other, becomes immaterial.

GOBIND CHUNDER KOONDOO *v.* TARUCK CHUNDER BOSE ... 145

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RES JUDICATA—*Civil Procedure Code (Act X of 1877). s. 13—Application under the Admininistrator-General's Act (XXIV of 1867), s. 60—Act II of 1874, s. 63—"Suit."*] An application by petition under s 63 of Act II of 1874 is a suit within the meaning of s. 13 of Act X of 1877, and therefore such an application is barred by the disposal of a former application in the same matter under the same section, or under s. 60 of Act XXIV of 1867, which the Act of 1874 repeals: this is so whether the order is one for payment of money or one dismissing the petition.

Section 63, Act II of 1874, contemplates that the money, which is the subject of the petition, may be claimed by parties other than the applicant, and that those parties may appear and be represented at the hearing; and the words "binding on all parties" were intended to make the order binding upon such parties as well as on the petitioner.

The order passed under that section can be reviewed under s. 623 of Act X of 1877.

ELIZA SMITH *v.* THE SECRETARY OF STATE. IN THE MATTER OF ACT II OF 1874 340

———*Limitation—Beng. Act VIII of 1869, s. 29—Tenancy in abeyance—Obligation to payment.*] *A*, the zemindar, granted a patni lease of certain talooks to *B*, who assigned it to *C* and *D*. On B's death, *C* and *D* applied to the Collector for registration of the patni talook in their names as assignees of *B*. *A*. objected to the registration on the ground that the lease enured only for the life of *B*. *A's* objection being overruled, he instituted a regular suit to eject *C* and *D*, the present defendants, which was decided against *A* finally by the Privy Council in 1874. During the pendency of this litigation, the zemindar sued to recover the rent for the year 1868, not upon the basis of the patni lease, but for use and occupation, treating the tenants as mere trespassers. This suit was dismissed on the ground that the plaintiff ought to have sued on the lease. In 1875, the plaintiff brought the present suit for the rent of 1868 on the patni lease. The defendants pleaded *res judicata* and limitation. The plaintiff contended that the suit was within time, on the ground that the right to recover the rent was in suspense during the pendency of the litigation regarding the lease.

Held, that the suit, though not *res judicata*, was barred under s. 29 of Beng. Act VIII of 1869. *Rani Swarnamayi* v. *Mukhi Barmani* distinguished.

WATSON & CO., *v.* DHONENDRA CHUNDER MOOKERJEE ...

———*Simple Mortgage Bond—Mortgagee's Lien—Money Decree—Mortgagor's Right, Title and Interest sold—Registration Act—Summary Procedure under Act XX of 1866, s. 53—Act VIII of 1859, s. 2.*] *A* having a simple mortgage bond which was specially registered, obtained a summary decree under the provisions of the Registration Act, and attached the lands under mortgage to him. Prior to *A's* decree these lands had been attached by other creditors, and subsequent to *A's* decree they were sold to *B*. After such sale, *A*, under his attachment, sold the right, title and interest of the mortgagor, which he himself purchased. *A* now sued the mortgagor and *B* to enforce his mortgage lien against the mortgaged properties. *Held* that, according to the decision of *Syud Emam Momtaz-ooddeen Mahomed* v. *Rajcoomar Dass*, the suit should be dismissed.

DOSS MONEY DOSSEE *v.* JONMEJOY MULLICK ... 313

———*Suit for Rent.*] The plaintiff sued the defendant in the year 1873 for arrears of rent at a certain rate per bigha. The

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defendant pleaded that the land had been held by him at an uniform rent for more than twenty years, and this contention was supported by the Court. The plaintiff then gave the defendant notice of enhancement, and sued to recover rent for two years at the rate stated by the defendant, and for one year at an increased rate. To this suit the defendant raised substantially the same defence. *Held*, that the decision in the previous suit was not a bar to the present suit, there being two questions for consideration—one, whether there had been an uniform payment of rent for twenty years, and, if so, whether the presumption, which the law directs to be drawn from an uniform payment of rent for twenty years, had been rebutted by the plaintiff; neither of which questions were concluded by the previous decision.

GOPEE MOHUN MOZOOMDAR *v.* HILLS 789

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——OF BANK TO REFUSE TO REGISTER 392
See BANK OF BENGAL ACT.

——OF LANDLORD TO DETERMINE TENANCY ... 696
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——OF OCCUPANCY—*Title by Possession.*] A ryot occupying and cultivating land for more than twelve years under a landlord who has no title to the land, nevertheless acquires a right of occupancy. The right is not one conferred by any lessor. It is a right which, by virtue of the law, grows up in the ryot from the mere circumstance of cultivating the land for twelve years or upwards and paying rent due thereon.

ZOOLFUN BIBEE *v.* RADHICA PROSONNO CHUNDER ... 560

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RULES OF HIGH COURT (4th Dec. 1875) 1 and (9th Feb. 1876) 8 312
See PRACTICE.

SALE BY SHERIFF UNDER WRIT OF *FIERI FACIAS*—*Warranty.*] A writ of *fieri facias* issued to the Sheriff authorizes him to seize the property of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

But if the Sheriff acts *ultra vires*, *e.g.*, if he seizes and sells property not within his jurisdiction, he cannot invoke the protection which

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the law gives him when acting within his jurisdiction, and he stands in the same position as an ordinary person who has sold that which he had no title to sell.

Since there is not in India the difference between real and personal estate which obtains in England, and moveable and immoveable property there are alike capable of being seized and sold under a writ of *fieri facias*, the responsibility of the Sheriff in respect of sale in that country is governed by the law relating to chattels, rather than by that relating to the sale of real estate.

A Sheriff, who in his official capacity seizes and sells property, undertakes by his conduct that he has legal authority to do so. When from his having acted beyond the territorial jurisdiction of the Court whose officer he is, the sale becomes inoperative and ineffectual, the purchaser may have a case for relief as against the judgment-creditor who has received the purchase-money, if it should appear that the Sheriff has acted under his authority and by his express directions.

DORAB ALLY KHAN *v.* THE EXECUTORS OF KHAJAH MOHEEOODDEEN 806

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SALE FOR ARREAR OF GOVERNMENT REVENUE ... 504
See POSSESSION, SUIT FOR.

——————REVENUE, SUIT TO SET ASIDE—*Fraud—Act XI of 1859—Limitation—Agent—Contract Act (IX of 1872), ss. 18 and 185—Form of Decree.*] When one of several co-sharers fraudulently contrived to have an estate brought to sale for arrears under Act XI of 1859, and purchased it in the *benami* of his son,—*held*, that another co-sharer aggrieved by the sale could maintain a suit to have the property reconveyed, though the period limited by s. 33 of Act XI of 1859, and art. 14 of the second schedule to Act IX of 1871, for a suit to set aside the sale, had expired.

BHOOBUN CHUNDER SEN *v.* RAM SOONDER SURMA MOZOOMDAR 300

——————————*Under-tenure, Suit to avoid—Permanent Settlement—Structures and Improvements within the meaning of excep. 4 to s. 37 of Act XI of 1859—Decree for ejectment.*] In a suit to avoid an under-tenure by the purchasers at an auction-sale for arrears of Government revenue, the defendants contended that the tenure was created prior to the Permanent Settlement, and that some portion of the lands comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under exceps. 1 and 4 to s. 37 of Act XI of 1859: but the lower Court gave a decree to the plaintiffs and annulled the under-tenure. *Held* by WHITE, J., that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structures that may be upon his holding.

BHAGO BIBEE *v.* RAM KANT ROY CHOWDRY 293

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——————————OF DECREE—*Dispossession of Third Person upon Sale in Execution of a Decree—Act VIII of 1859, s. 269.*] There is no provision in the Civil Procedure Code, similar

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STAMP ACT (XVIII OF 1869), ss. 34, 41, SCHED. II, CLS. 5, 20—*Policy of Assurance—Assignment and Retransfer by Endorsement.*] A policy of insurance bore three endorsements; the first, an assignment of all the right, title, and interest of the assured to the P. Bank; the second, a retransfer from the P. Bank to the assured, all claims having been satisfied; the third, an assignment by the assured similar to the first assignment to Messrs. B. R. S. and Company.

Held by MARKBY and AINSLIE, JJ., that the first and third endorsements were liable, as collateral instruments under Sched. II, cl. 20, of the General Stamp Act, to a stamp of one rupee, and that the second endorsement was not chargeable with stamp duty.

Held by GARTH, C.J., that none of the endorsements were chargeable with duty.

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——— BY PERSON IN POSSESSION OF LAND TO ESTABLISH TITLE—*Declaratory Decree—Act VIII of 1859, s. 15—Practice—Grounds of Appeal taken in Argument.*] The plaintiff, in a suit to establish her lakheraj right to lakheraj land, stated in her plaint that she was in possession of certain land by virtue of the will of her husband; that, while in possession of the land, a suit was brought against her in the Small Causes Court for rent by the defendants, who obtained a decree; and that there being no appeal against the decision, the lakheraj rights in respect of the lands were consequently injured; she therefore brought the present suit.

Held, that such a suit was not maintainable, as the claim which the defendants set up was no longer in the condition of a mere assertion or a claim for right, but had passed into a decree.

Held, further, that in this case the plaintiff was not without a remedy, for, if a further suit for rent be brought, she might file a suit and apply for an injunction to prevent the other party from proceeding so long as her suit was not disposed of and an absolute relief given her.

Held further, that although, as a rule, the Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, yet where a decree comes before it, which is upon its very face illegal, the Court is bound to take up the point itself and rectify the mistake.

Semble per JACKSON, *J.*—That the plaintiff might, if a fresh suit for rent be brought, again raise the question of her lakheraj title, because the Small Cause Court has no power to determine finally a question of right.

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SUPERINTENDENCE OF HIGH COURT—*24 and 25 Vict., c. 104, s. 15—Act XXIII of 1861, ss. 26 and 35.*] The High Court will not, under s. 15 of 24 and 25 Vict., c. 104, interfere with judgments, decrees, or orders of a lower Court on the bare ground that they are erroneous at law, or are based upon a wrong conclusion of facts; there must be some special ground justifying the High Court to exercise such powers.

Where the appellant has a remedy by regular suit, the Court is reluctant to interfere.

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TITLE—*Adverse Possession—Limitation.*] Twelve years' continuous possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner, but confers a good title upon the wrong-doer.

Semble—Such title may be transferred to a third person whilst it is in course of acquisition and before it has been perfected by possession.

Suits for possession distinguished from suits for declaration of a particular title.

Where a plaintiff seeks to recover possession of property of which he has been dispossessed, and bases his claim on the ground of purchase and also on the ground of a twelve years' possessory title, he is entitled to succeed if he proves his possession, even if he fails to prove his purchase.

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